17

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 15

E. P. McCABE, J. T. JETER, JOHN W. CAPERS, AND S. G. GARRETT, APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 9, 1911.

(22,898)

(22,898)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 111.

E. P. McCABE, J. T. JETER, JOHN W. CAPERS, AND S. G. GARRETT, APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1913.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1910, of said Court, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore to-wit: on the nineteenth day of April, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Oklahoma was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein E. P. McCabe, et al., were Appellants, and The Atchison, Topeka and Santa Fe Railway Company, et al., were Appellees, which said transcript of record is in the words and figures following to-wit:

1 UNITED STATES OF AMERICA, *ss:*

To the Atchison, Topeka and Sante Fe Railway Company, a Corporation, The St. Louis and San Francisco Railroad Company, a Corporation, The Missouri Kansas and Texas Railway Company, a Corporation, The Chicago Rock Island and Pacific Railway Company, a Corporation, The Fort Smith and Western Rail Road Company, a Corporation, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, Sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the Circuit Court of the United States for the Western District of Oklahoma wherein E. P. McCabe, J. T. Jeter, John W. Capers, and S. G. Garrett, are Appellants and you are Appellees, to show cause, if any there be, why the Decree rendered against the said Appellants as in said Appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral, Judge of the Circuit Court of the United States for the Western District of Oklahoma, This 12th day of February, 1909.

JOHN H. COTTERAL, *Judge.*

No. 158. E. P. McCabe, et al., Complainants and Appellants, vs. Atchison, Topeka and Sante Fe Railway Company et al., Defendants and Appellees. Citation. Wm. H. Harrison, E. T. Barbour and E. O. Tyler, Attorneys for Appellants.

In the Circuit Court of the United States in and for the Western District Oklahoma.

E. P. McCabe, J. T. Jeter, John W. Capers and S. G. Gaffett, Complainants,

vs.

The Atchison, Topeka & Santa Fe Railway Company, a Corporation; The St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island & Pacific Railway Company, a Corporation; The Fort Smith & Wester- Railroad Company, a Corporation, Defendants.

2 *Acceptance of Service.*

I, Cottingham & Bledsoe, hereby accept service for the Atchison, Topeka & Santa Fe Railway Company this 6th day of March, 1909.

COTTINGHAM & BLEDSOE,
Attorney-.

I, Clifford L. Jackson, hereby accept service for the Missouri, Kansas & Texas Railway Company this 4th day of March, 1909.

CLIFFORD L. JACKSON,
Attorney.

I, —— ——, hereby accept service for the Fort Smith & Western Railroad Company this 6th day of March, 1909.

—— ——,
Attorney.

I, R. A. Kleinschmidt, hereby accept service for the St. Louis & San Francisco Railroad Company this 20th day of February, 1909.

R. A. KLEINSCHMIDT,
Attorney.

I, C. O. Blake, hereby accept service for the Chicago Rock Island & Pacific Railway Company this 19th day of February, 1909.

C. O. BLAKE,
Attorney.

158. E. P. McCabe et al., vs. A. T. & S. F. Ry. Co. Citation and acceptance of service, Filed Mch. 8, 1909. Harry L. Finley Clerk, by Guy B. Gillette, Dep'y.

State of Oklahoma,
Logan County, ss:

John W. Capers, of lawful age being first duly sworn upon his oath deposes and says, that he is a resident of the City, of Guthrie, State and county aforesaid, and also one of the Plaintiffs, the Case,

158, in the United States Circuit Court for the Western District, of Oklahoma, Title of Case, E. P. McCabe, et al., vs. A. T. & S. F. Ry. Co., et al., a Corporation, et al.

Affiant, further avers and says that he served a copy of the order of the Court, which was made by the Hon. John H. Cotteral, on the 12th day of February 1909, said copy of said order was made by leaving a copy, with Benjamin F. Hegler Jr., under the direction of F. E. Dale, who direct- him the said Hegler, to accept the same, the said Hegler advised this affiant that as local Attorneys for the Fortsmith and Western Railroad Company, that said order would by him forwarded to the general attorney for the said Fortsmith and Western Railroad.

JOHN W. CAPERS.

STATE OF OKLAHOMA,
Logan County, ss:

Before me A. P. Portwood, a duly authorized Notary Public for the above named, county and State, personally appeared, John W. Capers, personally known to me, and after having read the above affidavit, says that he knows the contents thereof and that, the things contained therein are true.

A. P. PORTWOOD,
[SEAL.] *Notary Public.*

My Commission Expires Dec. 16/1912.

158. E. P. McCabe, vs. A. T. & S. F. Ry. Co. Affidavit of Service by Deft. Filed March. 8, 1909, Harry L. Finley, Clerk, By Guy R. Gillett, Deputy.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Western District of Oklahoma.

To the Hon. John H. Cotteral, Judge of the Circuit Court of the United States for the Western District of Oklahoma:

E. P. McCabe, of Logan County, Okla., and a citizen of the State of Oklahoma, J. F. Jeter of Oklahoma County, and a citizen of the State of Oklahoma; John W. Capers of Logan County, and a citizen of the State of Oklahoma; —— —— of S. G. Garrett, and a citizen of the State of Oklahoma; G. W. Chadwick, of Payne County, and a citizen of the State of Oklahoma, bring this their bill against the Atchison, Topeka and Santa Fe Railway Co., a corporation, of Kansas, and a citizen of the State of Kansas, the Saint Louis and San Francisco Railroad Co. a corporation of Missouri, and a citizen of the State of Mo., the Missouri, Kansas and Texas Railway Co. a corporation of Kansas, and a citizen of the State of Kansas, and the Chicago, Rock Island and Pacific Railway Co., a corporation, of Nebraska, Iowa, Ill., Kan. & Tex. and a citizen of the State of the same, and the Fort Smith and Western Railroad Co., a corporation, of Arkan-

sas, and a citizen of the State of Arkansas, and thereupon your orators complain and say that each of said orators is a negro and descendent of the African race. That each of said respondents is a railroad corporation, engaged in the transportation of
4 passengers and freight for hire in the State of Oklahoma and within the jurisdiction of this Court, and was such at all the times hereinbefore and hereafter mentioned. That as such it became and is the duty of such respondents and each of them to transport from place to place in the said State of Oklahoma, all persons, irrespective of race or color and without distinction, upon the payment of such fares and rates as is provided by law.

That by an Act of Congress of the United States of America entitled "An act to enable the people of Oklahoma and the Indian Territory to form a Constitution and State government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original states," approved June 16th, A. D. 1906, it is provided that "the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

That notwithstanding the terms of said Act of Congress and the Constitution of the State of Oklahoma, the said above named respondents and each of them is threatening to, and will on the 16th day of February, 1908, unless prevented and enjoined by this Court, make distinction in the civil rights of said orators and all persons of the Negro race in the conduct and operation of its said trains and passenger service in the State of Oklahoma, in this to-wit:—That equal comforts, conveniences and accommodations will not be provided for said orators and persons of the Negro race; that said passenger trains will not be constructed or maintained so as to enable persons of the Negro race to be provided with separate and equal toilet rooms for male and female passengers of said race; nor will separate and equal smoking car accommodations, nor separate and equal chair car, sleeping car and dining car accommodations be provided for said orators and persons of the Negro race who desire to become passengers on said trains; that separate waiting rooms without equal comforts and accommodations and conveniences are about to be constructed and maintained by said respondents, and each of them, for said orators and persons of the Negro race desiring to become passengers on the trains of said respondents, and each of them, without separate toilet rooms for male and female persons of said Negro race, no separate smoking rooms, nor seats equal in comfort, convenience and accommodation to that provided for persons of the white race.

5 That said orators and persons of the Negro race are engaged in various business enterprises which necessitate the use of said trains and passenger service of the respondents and each of them in traveling to and from various places in the State of Okla-

homa along the lines of railroad operated and maintained by the said respondents and each of them, and will be denied and deprived of said civil rights as citizens of the State of Oklahoma and of the United States, in the manner hereinbefore set out.

That the acts and conduct of said respondents, and each of them will be continuous, and will work great hardship upon the said orators and all persons of the Negro race desiring to become passengers on said trains, and unless restrained and enjoined by this Court from carrying out the threatened injury to said orators and Negroes, a multiplicity of suits will ensue, there being at least 50,000 persons affected in the said State of Oklahoma by the threatened wrongs of said respondents and each of them, and whose civil rights as citizens of the State of Oklahoma and of the United States are impaired, and there exists no adequate, speedy or effectual remedy at law therefor.

Wherefore, said orators pray an order of this Court restraining the said respondents and each of them from in any manner constructing, maintaining or operating passengers trains and coaches, depots, waiting rooms and all other passenger service in the State of Oklahoma, without equal toilet-rooms, chairs cars, sleeping cars, dining cars, smoking cars, seats and all other accommodations, comforts and conveniences provided to persons not of the Negro race, or in any manner make distinction in the civil rights of such persons of the Negro race on account of race and color in the conduct and operation of the passenger service and trains of the said respondents and each of them; that upon the hearing of this bill a temporary injunction be granted and upon the final hearing thereof, a perpetual injunction be granted as herein prayed for; that said orators recover their costs herein laid out and expended; and for all other relief to which said orators may be equitably entitled.

WM. HARRISON,
Attorney and Solicitor.

UNITED STATES OF AMERICA,
Western District of Oklahoma:

E. P. McCabe, J. T. Jeter, John W. Capers, Samuel G. Garrett and G. W. Chadwick, being first duly sworn on oath says, that
6 he has read the foregoing bill, and all the allegations therein contained are true.

E. P. McCABE.
J. T. JETER.
JOHN W. CAPERS.
SAMUEL G. GARRETT.
G. W. CHADWICK.

Subscribed and sworn to before me this 15th day of Feb., 1908.
[SEAL.] HARRY L. FINLEY,
Clerk United States Circuit Court,
Western District of Oklahoma.

Endorsed on back as follows: No. 158. J. W. Capers et al. vs. The Atchison, Topeka & Santa Fe Ry. Co. et al., Defendants. Petition. Circuit Court of the United States. Western District of Oklahoma. Clerk's office. Filed Feb. 15, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States in and for the Eighth Circuit and the Western District of Oklahoma.

In Equity.

E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, S. G. Garrett, Complainants,

vs.

Atchison, Topeka & Santa Fe Railway Company, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island & Pacific Railway Company, a Corporation, and the Fort Smith & Western Railroad Company, a Corporation, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Eighth Circuit and the Western District of Oklahoma:

E. P. McCabe, a citizen and resident of the Western District of the State of Oklahoma; J. T. Jeters, a citizen and resident of the Western District of the State of Oklahoma; John W. Capers, a citizen and resident of the Western District of the State of Oklahoma, and G. W. Chadwick, a citizen and resident of the Western District of the State of Oklahoma, and S. G. Garrett, a citizen and resident of the Western District of the State of Oklahoma, brings this their amended bill against the Atchison, Topeka and Santa Fe Railway Company, a corporation duly created organized and existing under and by virtue of the laws of the State of Kansas and a citizen and resident of the State of Kansas, and the St. Louis & San Francisco Railway Company, a
7 corporation duly created and existing under the laws of the State of Missouri, and a citizen and resident of the State of Missouri, the Missouri, Kansas & Texas Railway Company, a corporation duly created and existing under and by virtue of the laws of the State of Kansas and a citizen and resident of the State of Kansas; the Chicago, Rock Island & Pacific Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois, and a citizen and resident of said state of Illinois, and the Fort Smith & Western Railroad Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Arkansas and a citizen and resident of said State of Arkansas.

And thereupon your orators complain and say:

First. That each and every one of your orators is a negro and a descendant of the African race, and is a resident and citizen of the Western District of the State of Oklahoma, and that each and every one of the defendants above named is and was at all of the times hereinafter mentioned, a railroad corporation engaged in the transportation of freight and passengers for hire in the State of Oklahoma and in the Western District thereof and within the jurisdiction of this court, and was such at all the times hereinafter mentioned, and

that such defendants are now and were at the times hereinafter mentioned, citizens and residents of the state above set out.

Second. That as such common carriers of passengers it is the duty of such defendants and of each of them to transport from place to place in said State of Oklahoma, and from points outside said state to points therein, and from points within said state to outside points, and from points outside said State through said State of Oklahoma to points of destination outside said State, all persons irrespective of their race or color and without any distinction, upon the payment of such rates and fares as are required by said Company, under the commerce clause of the Constitution of the United States, Article one, section three, sub-section eight, which provides that Congress shall have the exclusive power to regulate commerce between the states, with foreign nations and with the Indian tribes, and the said Act of the State legislature of the State of Oklahoma approved December 18, 1907, is in violation of the said Constitution of the United States.

Third. That by an Act of Congress of the United States of America, entitled, "An Act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government
8 and to be admitted into the Union on an equal footing with the original states, and to enable the people of New Mexico and Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states", which act was approved on June 16th, 1906, it is among other things provided that "the constitution shall be republican in form and make no distinction in civil or political rights on account of race or color and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence", which limitation in said act applies to the Constitution and State government of the State of Oklahoma.

Fourth. That in pursuance of the power granted the Territory of Oklahoma and Indian Territory by said Act, the said two territories duly proceeded to adopt a constitution and have been admitted into the Union under and by virtue of said act.

Fifth. That notwithstanding the terms of said act of Congress which have been adopted into and become a part of the Constitution of the State of Oklahoma, the legislature of the State of Oklahoma passed an act entitled "An act to promote the comfort of passengers on railroad, etc." which act was declared an emergency act and was approved on the 18th day of December, 1907, and that the State of Oklahoma is now attempting to put said act in operation. That by said act it is among other things provided "that every railway company, urban or suburban car company, street car or interurban car or railway company, lessee, manager or receiver thereof, doing business in this State as a common carrier of passengers for hire, shall provide separate coaches or compartments as hereinafter provided for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and conveniences". That said act further provides that separate waiting rooms and separate conveniences are to be provided for the white and colored races, and prevents any colored person or persons of

African descent from having any of the facilities provided for white persons and requires separate facilities to be provided for persons of African descent and makes a distinction between persons of the white race and persons of African descent.

Sixth. That notwithstanding the terms of said Act of Congress and of the Constitution of the State of Oklahoma, the said above named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the State of Oklahoma, in this, to wit:

9 that equal comforts, conveniences and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars and dining car accommodations by providing for your orators and other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act.

And your orators charge that said act of the Legislature of Oklahoma above set out and approved December 18th, 1907, is repugnant to the laws of the United States in this, that it violates the provisions of said act of Congress approved June 16th, 1906, in that the said act of the legislature of the State of Oklahoma has made a distinction in the civil rights of your orators and other persons of African descent and of the white [*white*] race by providing separate waiting rooms and cars as above set out, and your orators further charge that said act discriminates and makes a distinction against your orators and other persons of the negro race, because the defendants above named and other railroads in the State of Oklahoma can not furnish equal accommodations to your orators and others of the negro race, except at such ruinous cost as would amount to a confiscation of the property of the said defendants and other railroads.

And your orators further charge that said act of the Oklahoma Legislature above referred to is in conflict with the 14th amendment of the Constitution of the United States, because said law abridges the privileges and immunities of your orators and other persons of the negro race who are citizens of the United States and deprives them of their rights, without due process of law.

And your orators further charge that the acts and conduct of the defendants and each of them are being done under the provision of the State of Oklahoma above set out, and will be continuous and will work great hardships upon your orators and all persons of the negro race desiring to travel on railroads in the State of Oklahoma, and unless restrained and enjoined by your honors from carrying

out the intended injury, a multiplicity of suits will ensue,
10 there being at least fifty thousand persons of the negro race in the State of Oklahoma who will be injured and deprived of their civil rights unless so restrained by this honorable court.

In consideration whereof and for as much as your orators are remediless in the premises at and by the strict rule of the common law and can only have relief in a court of equity, where such matters are cognizable and reviewable.

To the end therefore, that your orators may have that relief which they can only obtain in a Court of Equity and that said defendants may answer the premises, they now pray the court that the defendants and each of them be enjoined and restrained from in any manner constructing, maintaining or operating passenger trains and coaches, depots waiting rooms and all other passenger service in the State of Oklahoma in the manner provided by the Act of the Legislature above set out, or in any manner making distinctions in the civil rights of such persons of the negro race on account of race or color, in the conduct and operating of the passenger service and trains of the said defendants and each of them, and for such other and further relief as may be just and for costs.

May it please your honor to grant to your orators a writ of subpœna to be directed to each of the defendants above named, commanding them at a certain time and under certain penalty therein to be limited to appear before this honorable Court and then and there their full, true, direct and perfect answer make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orators will ever pray.

JOHN W. CAPERS.

WM. H. H. HART.
WM. HARRISON.
Protectors *for the Solicitors.*

STATE OF OKLAHOMA,
County of Logan, ss:

John W. Capers being duly sworn says that he is one of the complainants above named. That he has read the above and foregoing bill of equity and knows the contents thereof and that the same are true.

HARRY L. FINLEY,
Clerk United States District Court,
Western District of Oklahoma.

11 Sworn to and subscribed before me this 26th day of Feb. 1908.

[SEAL.] ——— ———.

Endorsed on the back: No. 158: E. P. McCabe, et al. vs. A. T. & S. F. Ry. Co. et al., Amended bill. Circuit Court of the United States. Western District of Oklahoma: Clerk's office. Filed Feb. 26, 1908, Harry L. Finley, Clerk.

2—111

Chancery Subpœna.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

The United States of America to the Atchison, Topeka and Santa Fe Railway Company, a corporation; the St. Louis and San Francisco Railroad Company, a corporation; the Missouri, Kansas and Texas Railway Company, a corporation; the Chicago, Rock Island and Pacific Railway Company, a corporation, and the Fort Smith & Western Railroad Company, a corporation, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America, for the Western District of Oklahoma, at the City of Guthrie, in said District, on the first Monday in the month of April next, to answer the Bill of Complaint of E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, and S. G. Garrett, this day filed in the Clerk's office of said Court in said City of Guthrie, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Oklahoma to execute:

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Guthrie, in said District this 26th day of February in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HARRY L. FINLEY, *Clerk.*

MEMORANDUM.—The above named defendants are notified that unless they enter their appearance in the Clerk's office of said court, at the city of Guthrie, aforesaid, on or before the day to 12 which the above writ is returnable, the compiaint will be taken against them as confessed, and a decree entered accordingly.

HARRY L. FINLEY, *Clerk.*

Endorsed on the back as follows:

United States Marshal's Return.

WESTERN DISTRICT OF OKLAHOMA, *ss:*

Received the within writ February the 27th, 1908, and executed the same as follows, to wit: Served on the within named Atchison, Topeka & Santa Fe Railway Company, a corporation, by delivering a duly certified copy of this writ to M. N. Cochrell, freight and ticket agent for said company, at Guthrie, Oklahoma, on the 27th day of February, 1908.

On the Missouri, Kansas & Texas Railroad Company, a corporation, by delivering a duly certified copy of this writ to M. N. Coch-

rell, ticket agent for said company, at Guthrie, Oklahoma, on the 27th day of February, 1908.

On the Fort Smith & Western Railroad Company, a corporation by delivering a duly certified copy of this writ to M. N. Cochrell, ticket agent for said company, at Guthrie, Oklahoma, on the 27th day of February, 1908.

On the Chicago, Rock Island & Pacific Railway Company, a corporation, by delivering a duly certified copy of this writ to A. Triplett, ticket agent for said company, at Guthrie, Oklahoma, on the 27th day of February, 1908.

The records of the District Clerk for the County of Logan, Oklahoma, in which said services were made, do not show that said corporations, or either of them have designated any agent in said county, upon which process may be served.

All this within the Western District of the state of Oklahoma

JNO. R. ABERNATHY,
U. S. Marshal.

By C. MADSEN,
Chief Office Deputy.

Further endorsed: No. 158. Circuit Court United States. Western District of Oklahoma. E. P. McCabe, et al. vs. A. T. & S. F. Ry. Co. et al. Chancery subpœna. Returnable to rule day, first Monday in April, A. D. 1908. Harry L. Finley, Clerk. Circuit Court of the United States, Western District of Oklahoma. Clerk's Office. Filed March 4, 1908. Harry L. Finley, Clerk. U. S. Marshal's office, Guthrie, Okla. Feb. 26, 1908. No. 15.

13 On Monday, March 9, 1909, the same being a regular judicial day of the Circuit Court of the United States for the Western District of Oklahoma, the following proceedings were had, to wit:

E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, and S. G. Garrett, Complainants,

vs.

Atchison, Topeka and Santa Fe Railway Company, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; Missouri, Kansas and Texas Railway Company, a Corporation; Chicago, Rock Island and Pacific Railway Company, a Corporation; Fort Smith and Western Railroad Company, a Corporation, Defendants.

Hearing on Application for Temporary Injunction.

Now on this March 9, 1908, this cause comes on for hearing on the application of the complainants for temporary injunction herein. The Complainants appear by their attorneys W. H. Hart, W. H. Harrison, E. O. Tylor and E. T. Barber, the defendant The Atchison, Topeka and Santa Fe Railway Company, a corporation, appears by its attorney J. R. Cottingham; the defendant The St. Louis and

San Francisco Railroad Company, a corporation, appears by its attorney C. B. Ames. The Missouri, Kansas and Texas Railway Company, a corporation, appears by its attorney, C. L. Jackson. The defendant, Chicago, Rock Island and Pacific Railway Company, a corporation, appears by its attorney C. O. Blake and the defendant Fort Smith and Western Railroad Company appears not. By consent of all parties Charles J. West, Attorney General of the State of Oklahoma is by the court permitted to appear and present an argument to the Court.

And thereupon — the facts set up in the bill herein filed, counsel make their arguments to the court; and the court takes the same under consideration.

On Tuesday, March 24th, 1908, the same being a regular judicial day of the Circuit Court of the United States for the Western District of Oklahoma, the following proceedings were had, to-wit:

E. P. McCABE, J. T. JETERS, JOHN W. CAPERS, S. G. GARRETT, and G. W. CHADWICK, Complainants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation; the St. Louis and San Francisco Railroad Company, a Corporation; The Missouri, Kansas and Texas Railway
14 Company, a Corporation; the Chicago, Rock Island and Pacific Railway Company, a Corporation; the Fort Smith and Western Railroad Company, a Corporation, Defendants.

Order Denying Temporary Injunction.

Now, to-wit, on this March 24, 1908, this cause comes on for decision and ruling of the court upon complainants' application and petition for temporary injunction herein.

The complainants appear by their attorney W. H. Harrison, the defendant, Atchison, Topeka and Santa Fe Railway Company, a corporation, appears by George M. Green, its attorney; the defendant Missouri, Kansas and Texas Railway Company, a corporation appears by Clifton L. Jackson, its attorney; the defendant St. Louis and San Francisco Railroad Company, a corporation, appears by C. B. Ames, its attorney, and the defendant Chicago, Rock Island and Pacific Railway Company, appears by Thos. R. Beman, its attorney. And the Court, having heretofore, to wit: on the ninth day of March, 1908, heard said application and petition and the argument of counsel thereon and having taken the same under consideration and now, at this time, being fully advised in the premises, finds that said application and petition should be overruled and denied.

It is therefore by the court considered, ordered and adjudged by the court that complainants' application and petition for a temporary injunction herein be and the same is hereby overruled and denied, to which finding, ruling and order of the court, complain-

ants and each of them, by their said counsel, duly except and exceptions are allowed by the court.

In the Circuit Court of the United States of the Eighth Circuit in and for the Western District of the State of Oklahoma.

In Equity.

E. P. McCABE et al., Complainants,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, et al., Respondents.

The Demurrer of the St. Louis & San Francisco Railroad Company, a Corporation, One of the Defendants Above Named.

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and for cause of demurrer shows:

15 First. That said bill of complaint is wholly without equity.

Second. That the said complainants have not, as appears by their said amended bill made out any title to the relief thereby prayed.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

FLYNN & AMES,
Solicitors for Said Defendant.

WESTERN DISTRICT OF OKLAHOMA,
County of Oklahoma:

L. T. Poole, makes solemn oath and says, that he is the station agent of the above named defendant, the St. Louis and San Francisco Railroad Company, and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

L. T. POOLE.

Subscribed and sworn to before me this 28th day of March, 1908.

[SEAL.] THEODORE ENDERLEIN,
Notary Public.

My commission expires Jan'y 7, 1911.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law, and that I am a member of the firm of Flynn & Ames, the solicitors for said defendant.

C. B. AMES.

Endorsed on the back as follows: No. 158. E. P. McCabe, et al., Complainants, vs. Atchison, Topeka & Santa Fe Railway Company, et al., Respondents. Demurrer of the St. Louis & San Francisco Railroad Co. Circuit Court of the United States. Western District of Oklahoma Clerk's office. Filed Mch. 30th, 1908. Harry L. Finley, Clerk. Flynn & Ames, Attorneys at law, Oklahoma City, Okla.

In the Circuit Court of the United States in and for the Eighth Circuit and the Western District of Oklahoma.

16 In Equity.

E. P. McCABE, J. T. JETERS, JOHN W. CAPERS, G. W. CHADWICK, S. G. GARRETT, Complainants,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island and Pacific Railway Company, a Corporation, and The Fort Smith and Western Railroad Company, a Corporation, Defendants.

The Demurrer of the Chicago, Rock Island and Pacific Railway Company to the Bill of E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, and S. G. Garrett, Complainants.

The Defendant, The Chicago, Rock Island and Pacific Railway Company, by protestation, not confessing or acknowledging any or all of the matters or things, in the said plaintiff's bill, to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and for cause of demurrer shows:

That the plaintiffs have not shown, by their said bill, that they are entitled to relief thereby prayed.

Whereas, and for other good causes of demurrer, appearing in said bill, this defendant demurs thereto and requests the judgment of this court whether it shall be compelled to make any further or other answer to said bill and prays to be dismissed with its costs and charges in this behalf.

C. O. BLAKE,
Solicitor for Defendant.

STATE OF OKLAHOMA,
County of Canadian, ss:

C. O. Blake makes solemn oath that he is solicitor for the above named defendant and as such has charge of its interests involved in this litigation and control of its defense in this action, and that the foregoing demurrer is not purposed for delay and is true and in point of fact.

C. O. BLAKE,
Solicitor for Defendant.

Subscribed and sworn to before me this 4th day of April, 1908.
[SEAL.] LAURA VANDYNE,
Notary Public.

My commission expires Jan. 13, 1909.

17 *Certificate of Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded on point of law.

H. B. LOW,
Counsel for Defendant.

Endorsed on the back as follows:
No. 158. E. P. McCabe, et al., vs. A. T. & S. F. Ry. Co., et al. Demurrer to Bill by Deft. C. R. I. & P. Filed April 8, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States Sitting in and for the Western District of Oklahoma and for the Eighth Circuit.

In Equity.

E. P. McCABE et al., Complainants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., Corporations, Defendants.

Notice.

The St. Louis & San Francisco Railroad Company, a corporation will take notice that the complainants in the above styled case have asked the clerk of the above named court to set the demurrer filed by said company for hearing on the 1st day of June, 1908, or as soon thereafter as counsel can be heard, at the city of Enid in the State of Oklahoma, the same being a regular rule day of said court.

WILLIAM HARRISON,
Attorney for Complainants.

I hereby accept service of said notice this 30th day of May, 1908.
FLYNN & AMES,
Attys. for St. L. & S. F. R. R. Co.

Endorsed: No. 158. E. P. McCabe, et al., vs. The Atchison, Topeka & Santa Fe Railway Company, et al. Notice. Filed June 4th, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States for the Western District of Oklahoma.

E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, and S. G. Garrett, Complainants,

vs.

Atchison, Topeka & Santa Fe Ry. Company, a Corporation; The St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Ry. Co., a Corporation; The Chicago, Rock Island & Pacific Railway Company, a Corporation; The Fort Smith & Western Railroad Company, a Corporation.

Now comes the complainant herein, by William Harrison, solicitor; and on motion it is ordered by the court that the bill of complaint filed in this suit be and is now taken as confessed by defendant;

The Atchison, Topeka & Santa Fe Ry. Co.; The Missouri, Kansas & Texas Ry. Company, and the Fort Smith and Western Railroad Company.

To the Clerk of said Court:

Enter the above in the order book in equity of said court.

WILLIAM HARRISON,
Solicitor for Complainant.

Endorsed on the back as follows: No. 158. Order Pro Confesso. Filed June 4, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States in and for the Eighth Circuit, Western District, State of Oklahoma.

E. P. McCabe and J. T. Jeters, John W. Capers, and G. W. Chadwick, Plaintiffs,

vs.

The Atchison, Topeka and Santa Fe Railway Company, The St. Louis and San Francisco Railroad Company, The Missouri, Kansas and Texas Railroad Company, The Chicago, Rock Island and Pacific Railroad Company, and The Fort Smith and Western Railroad Company, Defendants.

Motion to Set Aside Order Pro Confesso.

Comes now the defendant, the Atchison, Topeka and Santa Fe Railway Company, and moves the court to set aside the order pro confesso entered on the 4th day of June, A. D. 1908, and permit the said defendant to appear and plead, for the following reasons, to-wit:

That this is an action attacking the validity of one of the laws of the State of Oklahoma, and this defendant, with the other
19 defendants are merely nominal parties: that the honorable attorney general of the State of Oklahoma undertook and did

appear present and represent the interests of this defendant with the other defendants on the hearing in this court on the application for an injunction, and said defendant expected that the said attorney general would still continue to look after the interests of this defendant and file whatever pleadings were necessary in said cause and fully protect the interests of this defendant; that failure of this defendant to enter an appearance and pleading in said cause was on account of misadvertence and -understanding, and was not done for the purpose of delay.

Wherefore your petitioner prays that said order pro confesso, as far as this defendant is concerned, may be set aside and that this defendant be permitted to file a demurrer to said bill.

J. R. COTTINGHAM,
Solicitor for the Atchison, Topeka and Santa Fe Railway Company.

STATE OF OKLAHOMA,
Logan County, ss:

J. R. Cottingham, of lawful age, being first duly sworn deposes and says that he is solicitor for the State of Oklahoma for the defendant herein named; that he has read the above and foregoing motion and that the facts stated therein are true as he is verily informed and believes.

J. R. COTTINGHAM.

Subscribed in my presence and sworn to before me this 8th day of July, A. D. 1908.

[SEAL.] BERTHA SCHUPP,
Notary Public.

My commission expires July 2, 1910.

Endorsed on the back as follows: No. 158. U. S. Circuit Court, Western District, Oklahoma. E. P. McCabe, et al. vs. A. T. & S. F. Ry. et al. Motion to set aside order pro confesso. Circuit Court of the United States Western District of Oklahoma. Clerk's office. Filed July 8, 1908. Harry L. Finley, Clerk.

Further endorsed: No. 158. Guthrie, July 8, 1909. Motion granted and leave given to file demurrer. John H. Cotteral, Judge. Circuit Court of the United States. Western District of Oklahoma. Clerk's office. Filed July 8, 1908. Harry L. Finley, Clerk.

20 In the Circuit Court of the United States in and for the Eighth Circuit, Western District, State of Oklahoma.

E. P. McCABE and J. T. JETERS, JOHN W. CAPERS, and G. W. CHADWICK, Plaintiffs,

vs.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, THE St. Louis and San Francisco Railroad Company, The Missouri, Kansas and Texas Railroad Company, The Chicago, Rock Island and Pacific Railroad Company, and The Fort Smith and Western Railroad Company, Defendants.

Demurrer.

The Demurrer of the Atchison, Topeka and Santa Fe Railway Company to the Bill of Complaint.

And now comes the defendant, The Atchison, Topeka and Santa Fe Railway Company, and not confessing any of the matters in the bill to be true, demurs to the bill herein filed, and says that same does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

Wherefore, the defendant prays the judgment of this court whether it shall answer, and that it be dismissed with its costs.

J. R. COTTINGHAM,
Solicitors for the Atchison, Topeka and Santa Fe Railway Company.

I, J. R. Cottingham, Solicitor for defendant in the above, do hereby certify that the foregoing demurrer, in my opinion, is well founded in law.

J. R. COTTINGHAM, *Solicitor.*

STATE OF OKLAHOMA,
County of Logan, ss:

J. R. Cottingham, of lawful age, being first duly sworn, deposes and says that he is one of the officers of the above named corporation, and is authorized to make the affidavit herein, and that he states on his oath that the foregoing demurrer is not intended for delay.

J. R. COTTINGHAM,
Solicitor and Agent for the Atchison, Topeka and Santa Fe Railway Company.

21 Subscribed to and sworn to before me this 8th day of July, A. D. 1908.

[SEAL.] BERTHA SCHUPP,
Notary Public.

My Commission expires July 2, 1910.

Endorsed on the back as follows: No. 158, U. S. Circuit Court, Western District, Oklahoma. E. P. McSabe, et al. vs. A. T. & S. F. Ry. Co. et al. Demurrer. Circuit Court of the United States. Western District of Oklahoma. Clerk's Office. Filed July 8, 1908, Harry L. Finley, Clerk.

In the Circuit Court of the United States for the Western District of Oklahoma.

No. 158.

E. P. McCABE, J. T. JETERS, JOHN W. CAPERS, G. W. CHADWICK, and S. G. GARRETT, Complainants,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island & Pacific Railway Company, a Corporation, and The Fort Smith & Western Railroad Company, a Corporation, Defendants.

Motion.

Comes now the defendant, The Missouri, Kansas & Texas Railway Company, a corporation, and moves the court to set aside the decree pro confesso, entered herein against this defendant on the — day of July, A. D. 1908, and permit this defendant to appear and plead in said cause, for the following reasons, to-wit:

1. The Bill is fatally defective and the allegations therein insufficient to entitle the plaintiffs, or any of them, to the relief prayed for, or to any relief.

2. Counsel for this defendant had the understanding and impression that the amended pleadings were to be filed by said complainants in said cause and for this reason this defendant failed to plead to the bill of complainants.

This defendant further states to the court that [*is*] has a good and meritorious defense to said suit and desires to appear in said cause and defend.

THE MISSOURI, KANSAS & TEXAS RY. CO.,
By C. L. JACKSON &
C. G. HORNER,
Its Attorneys.

22 STATE OF OKLAHOMA,
County of Logan, ss:

C. G. Hornor being first sworn upon his oath says: That he is one of the attorneys for the above named defendant The Missouri, Kansas & Texas Railway Company, a corporation, and makes this affidavit for and on behalf of said defendant. Affiant states that the allegations of fact in the above and foregoing motion are true, as affiant verily believes.

C. G. HORNOR.

Subscribed and sworn to before me this the 11th day of July, 1908.

[SEAL.]

HARRY L. FINLEY,
Clerk U. S. Circuit Court.

Endorsed on the back as follows: 158: E. P. McCabe, vs. A. T. & S. F. Ry. Co. et al. Motion. Filed July 11, 1908, Harry L. Finley, Clerk. C. L. Jackson, C. G. Hornor, Solicitors.

Further endorsed: Motion sustained and leave [*give*] to plead as prayed. Dated July 17, 1908. John H. Cotteral, Judge. Circuit Court of the United States. Western District of Oklahoma. Clerk's Office. Filed July 17, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States for the Western District of Oklahoma.

#158.

E. P. MCCABE et al., Complainants,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Defendants.

Entry of Appearance.

The Clerk will please enter the appearance of the Missouri, Kansas & Texas Ry. Co. in said cause, and also my appearance as solicitor for said def't.

MISSOURI, KANSAS & TEXAS RY. CO.,
C. L. JACKSON &
C. G. HORNOR,
Solicitors.

Endorsed on the back as follows: 158. E. P. McCabe, et al. vs. A. T. & S. F. Ry. Co. et al. Appearance of M., K. & T. Ry. Filed July 17, 1908. Harry L. Finley, Clerk. C. L. Jackson & C. G. Hornor, Solicitors.

In the Circuit Court of the United States for the Western District of Oklahoma.

23 No. 158.

E. P. McCABE, J. T. JETERS, JOHN W. CAPERS, G. W. CHADWICK, and S. G. GARRETT, Complainants,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation, and The Chicago, Rock Island & Pacific Railway Company, a Corporation; The Fort Smith & Western Railroad Company, a Corporation, Defendants.

Demurrer.

The Demurrer of the Missouri, Kansas & Texas Railway Company, a Corporation, to the Bill of Complaint.

Comes now the defendant, The Missouri, Kansas & Texas Railway Company, a corporation, and not confessing any of the matters in the bill to be true, demurs to the bill herein filed and says the same does not state any matter or equity entitling complainants to the relief prayed for, nor are the facts stated sufficient to entitle complainants or any of them to any relief against this defendant.

Wherefore, defendant prays the judgment of this court whether it shall further answer and that it be dismissed with its costs.

THE MISSOURI, KANSAS & TEXAS RY. CO.,
By C. L. JACKSON,
C. G. HORNOR,
Solicitors.

I, C. G. Hornor, solicitor for defendant in the above, do hereby certify that the foregoing deurrer, in my opinion is well founded in law.

C. G. HORNOR, *Solicitor.*

STATE OF —,
County of —, ss:

I, W. E. Brown, being duly sworn, do say, upon oath That the Missouri, Kansas & Texas Railway Company is a corporation, organized and existing under the laws of the State of Missouri, and that I am superintendent of said corporation, and as such, duly authorized to make this affidavit and I do further say that the foregoing demurrer is not interposed for delay.

W. E. BROWN.

Subscribed and sworn to before me this the 18th day of July, A. D. 1908.

[SEAL.] HARRY L. FINLEY,
Clerk of the U. S. Circuit Court, Western Dist. Oklahoma.

24 Endorsed on the back: 158. E. P. McCabe, et al. v. A. T. & S. F. Ry. Co. et al. Demurrer of M. K. & T. Ry. Co. Filed July 18, 1908. Harry L. Finley, Clerk. C. L. Jackson, & C. G. Hornor, Solicitors.

In the Circuit Court of the United States in and for the Eighth Circuit, Western District, State of Oklahoma.

No. 158.

E. P. McCABE and J. T. JETERS, JOHN W. CAPERS, and G. W. CHADWICK, Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE St. Louis & San Francisco Railroad Company, The Missouri, Kansas & Texas Railroad Company, The Chicago, Rock Island and Pacific Railroad Company, and The Fort Smith & Western Railroad Company, Defendants.

Motion to Set Aside Order Pro Confesso.

Comes now the defendant, the Fort Smith and Western Railroad Company, and moves the court to set aside the order pro confesso entered on the 4th day of June, A. D. 1908, and to permit said defendant to appear and plead, for the following reasons, to wit:

That this is an action attacking the validity of one of the laws of the State of Oklahoma, and this defendant, with the other defendants, is and are merely nominal parties; that the Honorable Attorney General of the State of Oklahoma undertook and did, present and represent the interests of this defendant with the other defendants on the hearing in this court on the application for an injunction, and this defendant expected and believed that said Attorney General would still continue to look after the interests of this defendant and co-defendants, and file whatever of pleadings were necessary in said cause to fully protect the interests of this and the other defendants; that failure of this defendant to enter an appearance and pleading in said cause was on account of inadvertence and misunderstanding, and was not done for the purpose of delay.

Wherefore, Your petitioner prays that said order pro confesso as far as this defendant is concerned, may be set aside, and that this defendant be permitted to file a demurrer to said bill.

DALE & BIERER,
BENJ. F. HEGLER, JR.,
Attorneys for Ft. Smith & Western R. R. Co., Def't.

25 STATE OF OKLAHOMA,
Logan County, ss:

Frank Dale, of lawful age, being first duly sworn, deposes and says that he is a member of the firm of Dale & Bierer, attorneys with their principal place of business in the City of Guthrie, Logan County, Oklahoma; that said firm of attorneys are local attorneys

for the Ft. Smith & Western Railroad Company, and have been directly authorized and directed by the General Solicitor of said Fort Smith & Western Railroad Company, whose principal place of business is at Ft. Smith, Arkansas, and who is now outside of the City of Guthrie, and Logan County, to file the foregoing motion to set aside the order pro confesso entered in the above styled cause.

Affiant states that he has read the above and foregoing motion, knows the contents thereof, and that the facts stated therein are true as he verily believes and is informed.

FRANK DALE.

Subscribed and sworn to before me this 18th day of July, 1908.

[SEAL.] MARIE E. TERRELL,
Notary Public.

My commission expires Nov. 18, 1908.

Endorsed on the back as follows: No. 158. In the Circuit Court of the United States in and for the Eighth Circuit Western District State of Oklahoma. E. P. McCabe, et al., Plaintiff, vs. The Atchison, Topeka & Santa Fe Railway Company, et al. Defendants. Motion to set aside order pro confesso. Filed July 18, 1908. Harry L. Finley, Clerk. Dale & Bierer and Benj. F. Hegler, Jr. Attorneys for Ft. Smith & Western R. R. Co.

Further endorsed: #158. On consideration, it is ordered that this motion be sustained and that leave be granted the defendant to plead to complainant's bill as prayed. Dated this July 18, 1908.

JOHN H. COTTERAL, *Judge.*

Filed July 18, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States in and for the Eighth Circuit, Western District, State of Oklahoma.

26 No. 158.

E. P. McCABE et al., Complainants,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, et al., Respondents.

Demurrer of the Ft. Smith & Western Railroad Company, a Corporation, One of the Defendants Above Named.

This defendant, by protestation, not confessing or acknowledging any of the matters and things in said complainant's bill to be true in such manner and form as the same are therein set forth and plead-, demurs thereto, and for cause of demurrer says:

First. That said bill of complaint is wholly without equity.

Second. That the said complainants have not, as appears by their said amended bill, made out any title to the relief thereby prayed.

Wherefore, and for divers and other good causes of demurrer appearing in said bill, this defendant demurs thereto, and requests the judgment of this Court, whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

C. E. WARNER,
DALE, BIERER & HEGLER,
Attorneys for Ft. Smith & Western Railroad Company, Defendant.

WESTERN DISTRICT OF OKLAHOMA,
Logan County, ss:

A. C. Hixon, makes solemn oath and says that he is the General Agent of the above named defendant, the Fort Smith and Western Railroad Company, and that the foregoing demurrer is not interposed for delay, and that the said [—] is true in point of fact.

A. C. HIXON.

Subscribed and sworn to before me this 18th day of July, 1908.
[SEAL.] MARIE E. TERRELL,
Notary Public.

My commission expires Nov. 18, 1908.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law, and that I am a member of the firm of Dale & Bierer, attorneys for said defendant.

FRANK DALE.

27 Endorsed on the back as follows: No. 158. In the Circuit Court of the United States in and for the Eighth Circuit, Western District, State of Oklahoma. E. P. McCabe, et al., Complainants, vs. Atchison, Topeka & Santa Fe Railway Company, a corporation, et al., Respondents. Demurrer of the Ft. Smith & Western Railroad Company, a corporation, one of the defendants above named. Filed July 18, 1908. Harry L. Finley, Clerk. Dale & Bierer and Benj. F. Hegler, Jr., Attorneys for Ft. Smith & Western R. R. Co.

In the Circuit Court of the United States for the Western District of Oklahoma.

No. 158. In Equity.

E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, S. G. Garrett, Complainants,

vs.

Atchison, Topeka & Santa Fe Railway Company, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island & Pacific Railway Company, a Corporation, and The Fort Smith & Western Railroad Company, a Corporation, Defendants.

Final Decree.

Now on this seventh day of September, 1908, the same being a regular *judicial* day of the June, 1908, term of said Court, comes on for hearing and final determination the separate demurrers of each of the defendants filed herein to complainants' bill, the complainants appearing by their solicitors Wm. Harrison, E. T. Barbour and E. O. Tyler, and the defendants appearing by their solicitors George M. Green and C. G. Hornor.

Thereupon the complainants interpose a motion to the Court for judgment by default against all the defendants herein on the grounds that the said demurrers are not properly verified. And the Court being fully advised in the premises overrules the said motion for judgment against the defendants. To which order and ruling of the Court the complainants at the time excepted and except.

Thereupon argument of Counsel is heard upon the said demurrers, and the court being fully advised in the premises, finds that the said demurrers and each of them, should be sustained.

It is therefore, ordered, adjudged and decreed by the Court that the separate demurrers of the defendants, and each of
28 them, to complainants' bill, be and the same are hereby sustained, to [*to*] which orders and rulings of the court and each of them, the complainants at the time excepted and except.

And thereupon the complainants elect to stand upon their bill of complaint, whereupon—

It is ordered, adjudged and decreed by the court that the complainants' bill be, and the same is hereby dismissed at the costs of the complainants. To which judgment and decree the complainants at the time duly excepted and except.

Thereupon the complainants in open court pray an appeal of this cause from the said judgment and decree to the United States

Circuit Court of Appeals for the Eighth Circuit, and said appeal is accordingly granted and allowed by the Court.

JOHN H. COTTERAL, *Judge.*

O. K.

WM. HARRISON,
E. T. BARBOUR,
E. O. TYLER,
Solicitors for Complainants.

O. K.

C. G. HORNOR,
GEO. M. GREEN,
Solicitors for Defendants.

Endorsed on the back as follows: No. 158. In Equity. McCabe, et al., Complainant, vs. A. T. & S. F. Ry. Co. et al., Defts. Journal Entry of Judgment. Filed Sept. 7, 1908. Harry L. Finley, Clerk.

In the Circuit Court of the United States in and for the Western District of Oklahoma.

In Equity.

E. P. McCabe, J. T. Jeters, John W. Capers, and S. G. Garrett, Complainants,

vs.

The Atchison, Topeka & Santa Fe Railway Company, a Corporation; St. Louis & San Francisco Railroad Company, a Corporation; Missouri, Kansas & Texas Railway Company, a Corporation; Chicago, Rock Island & Pacific Railway Company, a Corporation; Fort Smith & Western Railroad Company, a Corporation, Defendants.

Application for Appeal.

The above named complainants, E. P. McCabe, J. T. Jeters, John W. Capers and S. G. Garrett, conceiving themselves aggrieved by the final decree, order and judgment entered in the above entitled cause on the 7th day of September, 1908, hereby appeal separately from so much of said final decree or order as adjudges and decrees that the demur of the Defendants to the Bill of Complaint of the Complainants be sustained, and that said Bill of Complaint be dismissed. And the said E. P. McCabe, J. T. Jeters, John W. Capers, and S. G. Garrett, Complainants, pray that this their appeal to the United States Circuit Court of Appeals for the Eighth Circuit, may be allowed, and that a transcript of the record and proceedings and papers upon which the final decree, order and judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

29

And now, at the time of filing this petition for appeal, said E. P. McCabe, J. T. Jeters, John W. Capers, and S. G. Garrett, appellants, file [and] assignment of errors setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Eighth Circuit, and your petitioner will ever pray.

E. P. McCABE,
J. T. JETER,
JOHN W. CAPERS, AND
S. G. GARRETT,
By WILLIAM HARRISON,
Attorney for Complainants.

The foregoing application for an appeal is granted and the appeal is hereby allowed to the United States Circuit Court of Appeals as prayed for in said application.
This 12th day of February, 1909.

JOHN H. COTTERAL, *Judge.*

Endorsed on the back as follows: No. 158. E. P. McCabe, et al. Complainants and Appellants, vs. Atchison, Topeka and Santa Fe Railway Company, et al. Defendants and appellees. Application and order for appeal. Filed Feb. 12, 1909. Harry L. Finley, Clerk. Wm. H. Harrison, E. T. Barbour, and E. O. Tyler, Attorneys for appellants.

In the Circuit Court of the United States in and for Western District of Oklahoma.

In Equity.

E. P. McCABE, J. T. JETERS, JOHN W. CAPERS, S. G. GARRETT,
Complainants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation; The St. Louis & San Francisco Railroad Company,
30 a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island & Pacific Company, a Corporation; The Fort Smith & Western Railroad Company, a Corporation, Defendants.

Assignment of Errors.

Now comes the above named appellants, E. P. McCabe, J. T. Jeters, John W. Capers, and S. G. Garrett, by their attorneys, William Harrison, E. T. Barbour, and E. O. Tyler, and file the following assignments of error upon which they will rely upon the prosecution of the Appeal in the above entitled cause which they aver occurred upon the trial of this cause, to wit:

(1.)

The Circuit Court of the United States in and for the Western District of Oklahoma of the Eighth Circuit erred in sustaining the demurrer to the Bill of Complainants to which ruling of the court the Complainants at the time excepted and still except and which demur should have been overruled, because,

(*a*) It appears upon the fact of the Bill of Complainants that the defendants and none of them are providing the complainants and other persons of the Negro Race with equal and separate toilet and waiting rooms, for male and female passengers, nor with equal smoking car accommodations, nor with separate and equal chair cars, sleeping car and dining car accommodations.

(*b*) Because it appears upon the face of the Bill of Complainants that the Act of the Legislature of Oklahoma approved December 18th, 1907, and known as "The Separate Coach Law" is in conflict with Section 25, of the Act of Congress approved June 6th, 1906, commonly known as the Enabling Act, and under which Act the State of Oklahoma was admitted to the Union.

(*c*) Because the said Act of the State of Oklahoma known as "The Separate Coach Act" approved December 18th, 1907, is in conflict with the 14th amendment of the Constitution of the United States.

(*d*) Because the said Act of the State of Oklahoma approved December 18th, 1907, is in conflict with Section 10 of Article 1 of the Constitution of the United States known as the Commerce Clause.

(*e*) Because it appears on the face of said Bill of Complainants that Section 7 of the said Act of the State of Oklahoma approved December 18th, 1907, is unconstitutional for the reason that the provisions of Section 7 therein discriminates against the
31 colored Race, and for the further reason that said Section permits the defendants to exclude Negroes from sleeping cars, dining cars and chair cars, and makes no provision for equal facilities for Negroes.

(*f*) Because it appears of the face of the Bill of Complainants and from the said Act approved December 18th, 1907, that said Act discriminates against the colored Race, and that said Act is repugnant to the Act of Congress approved June 6th, 1906, and known as the "Enabling Act"; and to the Constitution of the United States.

(2.)

The court erred in overruling motion of Complainants for judgment by default against the Defendants on the grounds that the demurrers of Defendants were not verified according to law.

(3.)

The Court erred in holding that Bill of Complainants did not state facts sufficient to constitute a cause of action and to require Defendants to answer further.

(4.)

The Court erred in allowing defendants to file, out of time, their demurs without notice to Complainants.

(5.)

The court erred in overruling the objection of Attorneys for Complainants to the demurrers of the Defendants.

(6.)

The Court erred in rendering judgment against Complainants and for Defendants.

Wherefore, the said Complainants, E. P. McCabe, J. T. Jeter, John W. Capers, and S. C. Garrett pray that the judgment of the said Circuit Court of the United States in and for the Eighth Circuit and the Western District of Oklahoma, appealed from herein, be in all things reversed.

WILLIAM HARRISON,
E. T. BARBOUR,
E. O. TYLER,
Attorneys for Appellant.

Endorsed on the back as follows: No. 158. E. P. McCabe, et al. Complainants and Appellants vs. Atchison Topeka and Santa Fe Railway Company, et al. Defendants and appellees. Assign-
32 ment of errors. Filed Feb. 12, 1909. Harry L. Finley, Clerk. Wm. H. Harrison, E. T. Barbour, and E. O. Tyler, Attorneys for Appellants.

In the Circuit Court of the United States in and for the Eighth Circuit and the Western District of Oklahoma.

In Equity.

E. P. McCabe, J. T. Jeters, John W. Capers, G. W. Chadwick, S. G. Garrett, Complainants,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation; The St. Louis and San Francisco Railroad Company, a Corporation; Missouri, Kansas and Texas Railway Company, a Corporation; Chicago, Rock Island and Pacific Railway Company, a Corporation; Fort Smith and Western Railroad Company, a Corporation, Defendants.

Bond.

Know all men by these presents, that we E. P. McCabe, J. T. Jeters, John W. Capers, S. G. Garrett, as principals and Tom H. Traylor, of Oklahoma County, State of Oklahoma, William H. Jernagin, of Oklahoma County, State of Oklahoma, and Thomas N. Hayes, of Canadian County, State of Oklahoma, as sureties, are held and firmly bound unto the Atchison, Topeka and Santa Fe

Railway Company, a corporation, the St. Louis and San Francisco Railroad Company, a corporation, Missouri, Kansas and Texas Railway Company, a corporation, Chicago, Rock Island and Pacific Railway Company, a corporation, Fort Smith and Western Railroad Company, a corporation, in the full and just sum of Three hundred dollars ($300.00) to be paid to the said defendants above named, their successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals this 12th day of February, in the year of our Lord, 1909.

Whereas, lately at the June term of the Circuit Court of the United States, in and for the eighth Circuit of the Western District of Oklahoma in a suit pending in said Court between E. P. McCabe, J. T. Jeter, John W. Capers, S. G. Garrett, plaintiffs, vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, the St. Louis San Francisco Railroad Company, a corporation, Missouri, Kansas and Texas Railway Company, a corporation, Chicago, Rock Island and Pacific Railway Company, a corporation, the Fort Smith and Western Railroad Company, a corporation, defendants,
33 judgment was rendered against the said plaintiffs and the said plaintiffs having obtained an appeal to the United States Circuit Court of Appeals to reverse the said Decree and judgment in the aforesaid suit, and a citation directed to the said Atchison, Topeka and Santa Fe Railway Company, a corporation, the St. Louis, San Francisco Railroad Company, a corporation, The Missouri, Kansas and Texas Railway Company, a corporation, Chicago, Rock Island and Pacific Railway Company, a corporation, the Fort Smith and Western Railroad Company, a corporation, defendants, citing, and admonishing them the said defendants, to be and appear in the United States Circuit [—] of Appeals for the eighth Circuit, at the City of St. Louis, Missouri, sixty days (60) from and after the date of this citation.

Now the condition of the above obligation is such, that if the said E. P. McCabe, J. T. Jeter, John W. Capers, S. G. Garrett, plaintiff, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals this the 12th day of February, in the year of our Lord, 1909.

JOHN W. CAPERS, *Principal,*
E. P. McCABE,
S. G. GARRETT, &
J. T. JETERS,
Principals,
By WILLIAM HARRISON,
Solicitor.
TOM H. TRAYLOR, *Surety.*
THOMAS N. HAYES, *Surety.*
WILLIAM H. JERNAGIN, *Surety.*

Signed, Sealed, in the presence of—
E. T. BARBOUR.

Signed in the presence of and acknowledged before me this the 12th day of February, A. D. 1909.

[SEAL.]

HARRY L. FINLEY,
Clerk U. S. Circuit Court,
By GUY R. GILLETTE, *Deputy.*

The above bond is hereby approved and ordered made a part of the record this 12th day of February, 1909.

JOHN H. COTTERAL, *Judge.*

34 *Justification of Sureties on Bond.*

In the Circuit Court of the United States for the Western District of Oklahoma.

No. 158.

E. P. McCABE et al., Plaintiff,
vs.
A., T. & S. F. RY. CO. et al., Defendant.

I, Tom H. Traylor, being first duly sworn according to law, on my oath, depose and say, that I am a resident of the County of Oklahoma in the State of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said State and a single man; that I am worth the sum of three thousand dollars ($3,000.00) consisting of the following property located in the County of Oklahoma, State of Oklahoma, and more particularly described as follows, to-wit

Lots #7 & 8, Blk. 12, south Oklahoma addition to Oklahoma City, worth the sum of		$4,500.00
That the property hereinbefore listed is unencumbered. That all my other debts amount to the sum of.....	$1,250.00	
That I am neither principal nor surety on any other bond or undertaking, except appearance bond in County court of Okla. County, State of Oklahoma vs. John Wilson	200.00	
Total	$1,450.00	$4,500.00

I am the same person who signed the bond in the case of E. P. McCabe et al., plaintiff, vs. A. T. & S. F. Ry. Co., et al., defendant. Case No. 158.

TOM. H. TRAYLOR.

Subscribed in my presence and sworn to before me after the foregoing affidavit was read to him in full by me this 12th day of February, A. D. 1909.

[SEAL.]

HARRY L. FINLEY,
Clerk of Said Court.
By GUY R. GILLETT, *Deputy.*

Endorsed on the back as follows: No. 158. E. P. McCabe, et al., complainants and appellants, vs. Atchison, Topeka and Santa Fe Railway Company, et al., defendants and appellees. Appeal Bond. Filed Feb. 12, 1909. Harry L. Finley, Clerk. Wm. H. Harrison, E. T. Barbour, E. O. Tyler, Attorneys for appellants.

35 In the Circuit Court of the United States for the Western District of Oklahoma.

E. P. McCABE et al., Complainants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RY. COMPANY et al., Defendants.

Præcipe for Transcript.

To the Clerk of said Court:

You will please make a transcript of the record in the above-entitled cause for transmission to the United States Circuit Court of Appeals for the Eighth Circuit, and incorporate therein the following:

(1) The original citation with acceptance of service.
(2) Petition.
(3) Amended Bill.
(4) Subpœna with Marshal's return.
(5) Record of hearing on application for Temporary Injunction.
(6) Demurrer of the St. Louis & San Francisco Railway Company.
(7) Demurrer of Chicago, Rock Island & Pacific Railway Company.
(8) Notice of hearing on Demurrers and acceptance of service.
(9) Order Pro Confesso.
(10) Motion of Atchison, Topeka & Santa Fe Railway Company to set aside decree Pro Confesso and order sustaining the same.
(11) Demurrer of Atchison, Topeka & Santa Fe Railway Company.
(12) Motion of Missouri, Kansas & Texas Railway Company to set aside decree. Pro Confesso and order sustaining said motion.
(13) Appearance of Missouri, Kansas & Texas Railway Company.
(14) Demurrer of Missouri, Kansas & Texas Railway Company.
36 (15) Motion of Fort Smith & Western Railroad Company to set aside decree. Pro Confesso and order sustaining said motion.
(16) Demurrer of Fort Smith & Western Railroad Company.
(17) Final Decree.
(18) Application and order allowing appeal.
(19) Assignment of error.
(20) Appeal Bond.

HARRISON, BARBOUR & TYLER,
Solicitors.

Endorsed on back: No. 158. E. P. McCabe et al., Complainants, vs. A., T. & S. F. Ry. Co. et al., Defendants. Præcipe for Transcript. Filed M'ch 13, 1909, Harry L. Finley, Clerk.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Harry L. Finley, Clerk of the Circuit Court of the United States for the Western District of Oklahoma, do hereby certify that the foregoing transcript contains true, full and complete copies of all the pleadings, proceedings, writs, records and record entries in the case of E. P. McCabe et al., Complainants, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, et al., defendants, No. 158, In Equity, as required by the "Præcipe for Transcript" filed by the Complainants on March 13th, 1909; as full, true and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation in said cause is hereto attached and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Guthrie, in said District, this 8th day of April, A. D. 1909.

[Seal U. S. Circuit Court, West. Dist. Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Filed Apr. 19, 1909. John D. Jordan, Clerk.

37 (*Appearance of Counsel for Appellants.*)

On the nineteenth day of April, A. D. 1909, the appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.

WILLIAM HARRISON,
Okla. City, Okla.
E. T. BARBOUR,
El Reno, Okla.
E. O. TYLER, *Kingfisher, Okla.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3054. E. P. McCabe et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Company et al. Appearance. Filed Apr. 19, 1909, John D. Jordan, Clerk. William Harrison, E. T. Barbour & E. O. Tyler, Counsel for Appellants.

(Appearance of Mr. C. O. Blake as Counsel for Appellee C., R. I. & P. Ry. Co.)

And on the thirteenth day of October, A. D. 1909, the appearance of Mr. C. O. Blake, as counsel for Appellee C., R. I. & P. Ry. Co., was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

38 The Clerk will enter my appearance as Counsel for the Appellee Chicago, Rock Island & Pacific Railway Company.

C. O. BLAKE,
El Reno, Oklahoma.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3054. E. P. McCabe et al., Appellants, vs. The Atchison, Topeka & Santa Fe Railway Company, et al. Appearance. Filed Oct. 13, 1909, John D. Jordan, Clerk. C. O. Blake, Counsel for Appellee Chicago, Rock Island & Pacific Railway Company.

(Appearance of Messrs. Cottingham & Bledsoe as Counsel for Appellee The A., T. & S. F. Ry. Co.)

And on the fourteenth day of October, A. D. 1909, the appearance of Messrs. Cottingham & Bledsoe, as counsel for appellee The A., T. & S. F. Ry. Co., was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellee The Atchison, Topeka & Santa Fe Railway Company.

J. R. COTTINGHAM,
S. T. BLEDSOE.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3054. E. P. McCabe et al., Appellants, vs. The Atchison, Topeka & Santa Fe Railway Company, et al. Appearance. Filed Oct. 14, 1909, John D. Jordan, Clerk. J. R. Cottingham, S. T. Bledsoe, Counsel for Appellee The Atchison, Topeka & Santa Fe Railway Company.

(*Appearance of Mr. Clifford L. Jackson as Counsel for Appellee M., K. & T. Ry. Co.*)

39 And on the fifteenth day of October, A. D. 1909, the appearance of Mr. Clifford L. Jackson, as counsel for the appellee M., K. & T. Ry. Co., was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCabe et al., Appellants,

vs.

The Atchison, Topeka & Santa Fe Railway Company et al.

The Clerk will enter my appearance as Counsel for the Appellee Missouri, Kansas & Texas Railway Company.

CLIFFORD L. JACKSON,
Muskogee, Okla.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3054. E. P. McCabe et al., Appellants, vs. The Atchison, Topeka & Santa Fe Railway Company, et al. Appearance. Filed Oct. 15, 1909, John D. Jordan, Clerk. Clifford L. Jackson, Counsel for Appellee Missouri, Kansas & Texas Railway Company.

(*Appearance of Mr. W. F. Evans et al. as Counsel for Appellee St. Louis & San Francisco Railroad Company.*)

And on the nineteenth day of October, A. D. 1909, the appearance of Mr. W. F. Evans, et al., as Counsel for Appellee St. Louis & San Francisco Railroad Company, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCabe et al., Appellants,

vs.

The Atchison, Topeka & Santa Fe Railway Company et al.

The Clerk will enter my appearance as Counsel for the Appellee St. Louis & San Francisco Railroad Company.

40

W. F. EVANS,
E. T. MILLER.
R. A. KLEINSCHMIDT.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3054. E. P. McCabe et al., Appellants, vs. The Atchison, Topeka & Santa Fe Railway Company, et al. Appearance. Filed Oct. 19, 1909, John D. Jordan, Clerk. W. F. Evans, E. T. Miller, R. A. Kleinschmidt, Counsel for Appellee St. Louis & San Francisco Railroad Company.

(*Appearance of Mr. Charles E. Warner as Counsel for Appellee Fort Smith and Western R. R. Co.*)

And on the fifth day of November, A. D. 1909, the appearance of Mr. Charles E. Warner, as counsel for appellee Fort Smith & Western R. R. Co., was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellee Ft. Smith & Western R. R. Co.

CHARLES E. WARNER,
Fort Smith, Ark.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3054. E. P. McCabe, et al., Appellants, vs. The Atchison, Topeka & Santa Fe Railway Co., et al. Appearance. Filed Nov. 5, 1909, John D. Jordan, Clerk. Charles E. Warner, Counsel for Appellee Ft. Smith & Western R. R. Co.

(*Motion of Appellees to Dismiss Appeal.*)

And on the second day of May, A. D. 1910, a motion of appellees to dismiss the appeal was filed in said cause, in the words and figures following, to-wit:

41 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., Appellees.

The Appellees move the Court to dismiss the appeal herein because

First. The appeal was prayed and allowed on the 7th day of September, 1908, (Record 27 and 28) and the assignments of error were not filed until the 12th day of February, 1909.

Second. Because there is no averment in the bill of complaint that the value of the rights involved amounts to the sum of Two Thousand Dollars or any other sum, and the bill was therefore insufficient to invoke the jurisdiction of said Court as a Circuit Court of the United States.

Respectfully submitted,

S. T. BLEDSOE,
C. L. JACKSON,
Att'ys for Appellees, A., T. & S. F. Ry. Co.; G., C. & S. F. Ry. Co.; M., K. & T. Ry. Co.
C. O. BLAKE,
R. A. KLEINSCHMIDT,
C. E. WARNER,
Att'ys for Appellees.

(Endorsed:) No. 3054. E. P. McCabe, et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Co. Motion Appellees to dismiss Appeal. Filed May 2, 1910, John D. Jordan, Clerk.

(*Argument Commenced.*)

And on the fourth day of May, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

42 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

WEDNESDAY, *May* 4, 1910.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

This cause having been called for hearing in its regular order, the motion of appellees to dismiss this appeal was called to the attention of the Court by Mr. S. T. Bledsoe, of counsel for appellees and the hour of adjournment having arrived further proceedings are postponed until tomorrow.

(*Order of Submission on Merits and Motion to Dismiss.*)

And on the fifth day of May, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

THURSDAY, *May* 5, 1910.

No. 3054.

E. P. MCCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

This cause having been called for further hearing, argument on the merits and the motion to dismiss was commenced by Mr. E. O. Tyler and continued by Mr. E. T. Barbour for Appellants, continued by Mr. S. T. Bledsoe for appellees and concluded by Mr. William Harrison for appellants.

Thereupon, this cause was submitted to the Court on the
43 merits and the motion to dismiss upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the tenth day of February, A. D. 1911, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, was filed in said cause, in the words and figures following, to-wit:

44 United States Circuit Court of Appeals, Eighth Circuit, De-December Term, A. D. 1910.

No. 3054.

E. P. MCCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Messrs. E. O. Tyler, E. T. Barbour and William Harrison, for appellants.

Mr. S. T. Bledsoe (Mr. J. R. Cottingham, Mr. C. O. Blake, Mr. Clifford L. Jackson, Mr. R. A. Kleinschmidt and Mr. C. E. Warner were on the brief), for appellees.

Before Sanborn, Hook and Adams, Circuit Judges.

ADAMS, *Circuit Judge*, delivered the opinion of the court:

This case turns upon the validity or true construction of an act of the legislature of Oklahoma, approved December 18, 1907, (Comp. Laws Okla., 1909, p. 271, Chap. 9, Art. II, Secs. 434 et seq.) requiring every railway company doing business in that State as a common carrier of passengers to provide separate coaches or compartments for the accommodation of the white and negro races, equal in all points of comfort and convenience, and to maintain separate waiting rooms at all their passenger depots for the accommodation of those races also equal in all points of comfort and convenience.

The complainants, five negro citizens of Oklahoma, instituted this suit against the defendants, several railway companies doing business throughout Oklahoma in state and interstate commerce, to enjoin them from obeying this law, on the grounds (1) that it violates the provisions of the act enabling the people of Oklahoma and the Indian Territory to form a constitution and be admitted into the Union, approved June 16, 1906 (Part 1, 34 Stat. 267), in this: that it makes a distinction between the civil rights of the negro and white race of men, contrary to the condition imposed by Sec. 25 of that act; (2) that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens and deprives them of the equal protection of the laws; (3) that it violates the provisions of the commerce clause of the Constitution in that it is an attempt to regulate commerce among the several states, and (4) that the several defendants are not in fact conforming to the requirements of the law by furnishing cars and waiting rooms for the negro race equal in point of comfort and convenience to those furnished for the white race.

The learned trial judge sustained a demurrer to the bill and, upon complainants declining to plead further, dismissed it. From this an appeal followed.

It is very clear, we think, that complainants cannot invoke the enabling act as, in itself, a prohibition against the legislation in question. The first paragraph of section 3 of that act reads as follows: "That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory" * * * "and, after organization, shall declare on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form, and make no distinction in civil and political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The authority conferred by this section with its limitations and prohibitions was most obviously addressed to the delegates chosen under the provisions of section 2 of the act, when they should have

assembled in convention for the purpose of forming a Constitution and State Government.

A Constitution which should make no distinction in civil or political rights on account of race or color was the only kind of a Constitution the delegates were empowered to make. When it should be made and the provisions of the enabling act found to have been "complied with in the formation thereof" by the President, who was the arbiter constituted for that purpose by the Fourth Section of the act, the State became a member of the Federal Union "on an equal footing with the original States." The working obligation or instructions imposed by the enabling act in the respect now under consideration upon the delegates chosen to make the Constitution ceased to have force or effect when that instrument was made and found and proclaimed by the constituted umpire to be in accordance with the act which authorized it. Permoli v. First Municipality, 3 How. 588, 609; Escanaba Co. v. Chicago, 107 U. S. 678, 688; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1; Ward v. Race Horse, 163 U. S. 504; Bollin v. Nebraska, 176 U. S. 83; United States ex rel. v. United States Express Co., 180 Fed. 1006.

46 The requirement of Section 22 of the enabling act that the Constitutional convention should accept the terms and provisions of that act and adopt an ordinance to that effect, to which our attention is specially directed by counsel for complainants, affords no additional warrant for their contention. The provisions which called the convention into being and fixed boundaries and limitations upon its powers were not enlarged by the adoption of that ordinance; neither were they diverted from their object and purpose as plainly expressed. Whatever effect the acceptance of the terms and provisions of the enabling act may have upon other questions to which they might be applicable, we are clearly of opinion it was never intended by the language employed to transfer the limitation upon the powers of the convention itself to the State legislature after statehood should have been accomplished.

Therefore, even if the Oklahoma statute, in some of its provisions made a distinction in civil rights on account of race or color contrary to the instructions of the enabling act (which, however, is not admitted) no cause of action could be predicated upon that act itself and no relief could be granted unless the distinction (or discrimination as it was called in argument) violated some of the prohibitions of the Federal Constitution, which after statehood became the exclusive Federal chart of complainants' civil and political rights.

The argument is next made that the statute in question violates the Fourteenth Amendment to the Constitution of the United States in that the enforced separation of the negro race from the white race in railroad cars and waiting rooms abridges the privileges and immunities of the former and denies to it the equal protection of the laws. This question, in our opinion, is not an open one. The Supreme Court of the United States in Plessy v. Ferguson, 163 U. S. 537 has foreclosed further discussion. Mr. Justice Brown, speaking for that court, made these observations: "The object of the amendment was undoubtedly to enforce the absolute equality of the

two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." * * * "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana" (similar to that here involved) "is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preserve
47 and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the act of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

In view of this decision further discussion of the general question is neither necessary nor seemly on our part.

But there is one special feature of the Oklahoma statute which counsel for the complainants contend is in itself discriminatory and operates to deprive the negro race of the equal protection of the laws within the meaning of the Constitution. This is found in the proviso to Section 7, which reads as follows: "Provided that nothing herein contained shall be construed to prevent railway companies in this State from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately, but not jointly."

In our opinion, this contention is not sound. Other parts of the statute make ample provision for the actual transportation of both races in reasonable comfort and convenience. Separate coaches or compartments equal in all points of comfort and convenience must, under severe penalties, be carried on each trip by every train moving within the State (Secs. 1 and 5). Sleeping cars, dining cars and chair cars are, comparatively speaking, luxuries, and properly enough no such imperative provisions are made concerning them as are made concerning the common and indispensable coach or compartment. The proviso imposes no obligation upon carriers to haul such cars for either race, but out of abundant caution lest the former provisions of the act, the key-note of which is equality of service between the races, should be construed to require the carriers to constantly haul separate sleeping, dining and chair cars for them, it is provided that they might haul them for the separate but not joint use of either of the races. This provision in itself makes

no more discrimination against one race than the other. The legislature having in mind doubtless, what we judicially know, that the ability of the two races to indulge in luxuries, comforts and conveniences, was so dissimilar that sleeping and dining cars which would be well patronized by one race might be very little if at all by the other, legislated accordingly and made a provision by which carriers might supply them for the exclusive use of either race as circumstances might dictate.

It may be conceded that the general principle of equality of service which pervades the Oklahoma statute and which is also required by the common and interstate commerce law (24 Stat. 379) must be observed by all carriers.

As a general rule, if carriers haul cars of special and peculiar convenience for citizens of one race they must provide equal service for citizens of the other race. Equality of service, however, does not necessarily mean identity of service; and manifestly this rule does not require permanent provision for equal service, irrespective of the demand for it. No mere question of abstract or theoretical right can require the constant and regular equipment and hauling of substantial empty dining, sleeping or chair cars for either race.

48

Practical considerations, which are potent in reaching a correct interpretation of any statute, cannot be ignored in applying the principle of equality of service to the two races in Oklahoma. Neither can any such interpretation be given to the statute of that State as would in effect require carriers to render service to either race without compensation. That would deprive them of their property without due process of law.

We conclude, in view of these and other like considerations, that the principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same.

But it is contended that the carriers operate under this law unevenly and oppressively to the negro race and by their interpretation and execution of its provision demonstrate that it is discriminatory. The contention is made on the supposed authority of the case of Yick v. Hopkins, 118 U. S. 356 and cases there cited. That was a case where the public authorities representing the State, against which alone the prohibition of the Fourteenth Amendment operates, exercised certain arbitrary powers conferred upon them by certain ordinances so as to unjustly discriminate against the Chinese. The Supreme Court held that: "Whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal

hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This doctrine, in our opinion, is totally inapplicable to the facts of the present case.

It may well be that the interpretation and application of a law of the State by the properly constituted authorities control its meaning within the purview of the Constitution; but most obviously such interpretation and application of it by private citizens, the defendant carriers in this case, can have no such effect. If it could
49 law-breakers might, by their continued violation of a law, convert their own lawlessness into law, and the law-breaker and not the law-maker might become its final interpreter.

Is this statute an invasion of the exclusive prerogative of Congress over interstate commerce?

It may be conceded that if it applies to interstate transportation it is a regulation of interstate commerce within the meaning of the Constitution. We think this follows from the doctrine laid down by the Supreme Court in Hall v. DeCuir, 95 U. S. 485. In that case a law of Louisiana as interpreted by its highest judicial tribunal required carriers of interstate commerce when operating within the limits of the State to receive colored passengers into cabins set apart for white persons. The court said: "It" (the statute) "does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within." This, it was held, interfered directly with the freedom of interstate commerce and therefore encroached upon the exclusive power of Congress. (See also Louisville &c. Ry. Co. v. Mississippi, 133 U. S. 587, 590, and Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 391.)

For like reasons the Oklahoma law, if, as properly construed, it embraces or relates to interstate commerce at all, would also be a regulation of that commerce. It compels carriers when operating in that State to exclude colored persons from cars or compartments set apart for white persons. The only difference between the Louisiana and the Oklahoma law is that the one compels carriers to receive into and the other to exclude colored persons from cars or compartments carrying white persons. They act alike directly upon the carrier's business as its passenger crosses the State line. Hence if one is a regulation of interstate commerce the other must be.

The contention, therefore, that the provisions of the Oklahoma statute do not amount to a regulation of interstate commerce, if they concern that commerce at all, is untenable.

The question then is: Whether that statute when properly construed applies to interstate transportation or whether it is limited in its application to that transportation which has its origin and ending within the confines of the State.

No provision is found in the act indicating in any express terms that it was intended to apply to interstate commerce. All its provisions concerning the subject of legislation are general.

Thus: Section 1 provides that "Every railway company" * * *

"doing business in this State," * * * "shall provide separate coaches," etc. Sections 2 and 6 make it unlawful "for any person" to occupy any waiting room or ride in any coach not designated for the race to which he belongs. While, therefore, the language
50 of the act literally construed is comprehensive enough to include railroads doing interstate business and include passengers while making interstate trips it, neither in express terms nor by any implication other than that involved in the general language employed, manifests any intention to invade the exclusive domain of Congressional legislation on the subject of interstate commerce.

Local transportation or that which is wholly within the State only, being within the competency of the State legislature, would naturally be presumed to have been alone contemplated in the law enacted by it. The constitutional inhibition against a State legislating concerning interstate commerce and the uniform decisions of courts of high and controlling authority emphasizing and enforcing that inhibition, without doubt, were actually as well as constructively known to the members of the legislature of Oklahoma. It is unreasonable to suppose they intended to legislate upon a subject known by them to be beyond their power and upon which an attempt to legislate might imperil the validity of provisions well within their power. Any other view would imply insubordination and recklessness which cannot be imputed to a sovereign state. This conclusion is supported by abundant authority.

In the case of Louisville &c. Ry. Co. v. Mississippi (supra), a statute of Mississippi similar to that under consideration requiring all railroads carrying passengers in that State to provide equal but separate accommodations for the white and colored races and obliging the conductors of passenger trains to assign each passenger to his appropriate car, was under consideration. The case was a writ of error to the Supreme Court of Mississippi which had ruled (66 Miss. 662, 6 So. 203) that the statute although general and comprehensive in its language was intended to affect only commerce within the State and was, therefore, not in violation of the commerce clause of the Constitution.

The Supreme Court in its decision had regard to the interpretation of the statute by the Supreme Court of Mississippi and held that commerce wholly within a state was not subject to the constitutional provision and as a necessary consequence that the law was not an infraction of the commerce clause of the Federal Constitution.

In Chesapeake & Ohio Ry. Co. v. Kentucky (supra), a statute was under consideration requiring all railroads to furnish separate coaches or compartments of equal convenience and accommodation for its white and colored passengers, empowering conductors to assign each white or colored passenger to his appropriate car or compartment and authorizing them to decline to carry any passenger who refused to occupy such car or compartment. The language of the statute was, literally speaking, sufficiently comprehensive to include interstate as well as intrastate transportation. In deciding the case the Supreme Court reviewed the Mississippi case and Plessy v. Ferguson (supra) and also the case of Ohio Val. Ry's. Receiver

v. Lander, decided by the Court of Appeals of Kentucky (47
51 S. W. 344). It quoted liberally from the last mentioned case upon the authority of which the case then under consideration had been decided by the Kentucky court, to the effect that the Kentucky legislature did not intend by the general language there employed to embrace transportation of interstate passengers but only domestic or intrastate passengers. The Supreme Court then said: "This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of all white and colored passengers, while they are in the State." * * *

But the court added: "Indeed, we are by no means satisfied that the Court of Appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its face to all passengers should be limited to such as the legislature were competent to deal with." * * * "While we do not deny the force of the railroad's argument in this connection, we cannot say that the General Assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and if we were in doubt on that point, we should unhesitatingly defer to the opinion of the Court of Appeals, which held that it would give it that construction if the case called for it."

In the more recent case of Chiles v. Chesapeake & Ohio Ry. Co., — U. S. —, decided May 31, 1910, the Supreme Court again considered the contention of a colored person made under the Kentucky statute, that he could not be required to occupy a car set apart exclusively for the transportation of persons of his race. It there reviewed its own decisions on the subject which have already been referred to, and refrained from discussing the Constitutional restraint upon state legislatures beased upon the distinction between white and colored races, on the ground as stated in the opinion, that it had been so much discussed in their own cases reviewed and cited "that we are relieved from further enlargement upon it." The judgment of the State court against the contentions of the colored person was affirmed, the court seeming to regard the great question now in controversy as foreclosed.

From the foregoing it appears to us that the decisions of the Supreme Court point to a harmonious and consistent attitude on its part adverse to complainants' present contention and while some of the decisions are fortified by local courts' interpretations of statutes, there seems to be a willing acquiescence in the interpretation so placed upon them.

Our own court likewise stands committed to a principle leading inevitably to the same result.

In the case of Butler Bros. Shoe Co. v. United States Rubber Co.,
84 C. C. A. 167, 156 Fed. 1, we had before us the right of a foreign corporation doing business in Colorado to recover on
52 certain contracts made by it with a domestic corporation. The defense was that the foreign corporation had not qual-

ified to do business in Colorado and had not paid the annual license tax required by all foreign corporations by the Constitution and statutes of that State as a condition for doing business therein. This court, speaking by Sanborn, Circuit Judge, said: "If the Constitution and statutes of Colorado are to be interpreted to mean, as they clearly read, to prohibit every foreign corporation from exercising any corporate power whatever, or doing any business whatever, in the State, unless they pay the fees and the annual license tax which this legislation requires as a condition thereof, they are unconstitutional and void, so far as they apply to interstate commerce conducted by foreign corporations or suits for and against them in the national courts. There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is today, and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the legislature of that State intended in the adoption of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intrastate business only," * * * "without a license from their State. Hence this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict with the Constitution and the laws of the United States." * * * "An interpretation of this legislation so it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just, and it is supported by high authority."

The Employers Liability Cases, 207 U. S. 463, are thought to be authority against the conclusion reached by us in this case. In those cases it was held that the act of Congress approved June 11, 1906 (32 Stat. 232), subjecting any common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States or between the states, to liability to "any of its employés," etc., was unconstitutional. Careful consideration of the opinions, however, has convinced us that the unconstitutionality of the act was not made to rest solely upon the provision creating a liability to "any" employé of a railroad company whether he was engaged in interstate commerce or not. As pointed out by Mr. Justice White, who wrote the opinion of the majority, the act of Congress had relation not only to railroads doing transportation business between the states but to those engaged in that business within the District of Columbia and within any of the territories of the United States over which Congress had plenary legislative power. It might in the District of Columbia and territories regulate the relation of carrier to employé in both inter and intrastate transportation. Hence came the dilemma. If the words "any employé," etc., * * * were limited to such employé as
53 was engaged in interstate commerce, as argued in support of the constitutionality of the act, it would destroy its applica-

bility to all railroad employés engaged otherwise than in interstate commerce in the District of Columbia and territories. Mr. Justice White, speaking of this situation, said: "Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employé when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy."

He then adds: "Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed form those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

Because, therefore, of the disposition of the Supreme Court uniformly shown in prior cases of like character to that now before us, we cannot believe The Employers' Liability Cases, involving as they did a totally different subject and one complicated by statutory provisions which would have been irreconcilable if the desired limitation had been imposed, were intended to be applicable to a case like this, or that on their authority we are required to overturn a well understood national policy concerning a troublesome inter-racial question.

The doctrine of this court as announced in Denver & R. G. R. Co. v. Wagner, 92 C. C. A. 527, 167 Fed. 75, 81, and that of the Supreme Court as stated in The Employers' Liability Cases is, that the legal provisions of the statute may be severed from those which are illegal, "where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

Applying this rule to the present case we have no doubt the legislature of Oklahoma would have enacted the statute in question had it in terms related only to domestic transportation. Why? As already pointed out, it knew it could go no further. It knew that legislation regulating interstate commerce was beyond its power.

Most obviously, then, it would not have imperiled the sepa-
54 ration of the races in domestic transportation, which, without doubt, comprehended the great bulk of that which materially concerned the convenience and sensibilities of the people of the State, by deliberately invading the forbidden field of interstate commerce.

Our conclusion is that the act of Oklahoma is not violative of the commerce clause of the Constitution.

It is next contended that the demurrer to the bill was improperly sustained because its averments disclosed that the defendant railroad companies were not in fact furnishing for the negro race coaches or waiting rooms equal in point of comfort or convenience to those furnished for the white race; that complainants were thereby damaged and that they could secure relief of this kind as incidental to the injunctive relief prayed for. It is argued that equity has jurisdiction to avoid a multiplicity of suits and also because no adequate remedy could be had at law.

The allegations of the bill thus brought into judgment are as follows: "That notwithstanding the terms of said act of Congress and of the Constitution of the State of Oklahoma, the said above named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the State of Oklahoma, in this, to-wit: that equal comforts, conveniences and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars and dining car accommodations by providing for your orators and other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act."

These allegations are too vague and uncertain to constitute a cause of action either in equity or at law. Moreover, the suit was instituted before the Oklahoma statute went into effect. Of course, therefore, no cause of action for damages could be stated. But even if that were possible such incidental legal relief could not be awarded in this case after the main injunctive relief sought by the bill and which was alone prayed for had been denied. Dowell v. Mitchell, 105 U. S. 430; Lewis Publishing Co. v. Wyman, — C. C. A. —, 182 Fed. 13, decided August 20, 1910, and cases cited.

55 Some questions of practice were argued at the bar and in the brief of counsel, but the disposition of the case on its merits dispenses with any consideration of them.

The decree below is affirmed.

Filed February 10, 1911.

SANBORN, *Circuit Judge,* dissenting:

The fourteenth amendment to the constitution of the United States provides that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws."

If each of two citizens of unobjectionable mental, moral and physical character, one a white man and the other a colored man, tenders and pays to one of the defendant railroad companies in Oklahoma that is operating upon its trains chair cars, sleeping cars and dining cars, the same lawful rate for his transportation between the same places in a chair car, or in a sleeping car, and for the customary use of a dining car on his journey, and the white man is furnished by the company with his ride in a chair car, or in a sleeping car, and with his dinner in the dining car, and the railroad company by authority of the separate coach law of Oklahoma, solely by reason of his color, prevents the colored citizen from riding in or using all of those cars and all other cars of a similar character, ejects him from any such car into which he enters and refuses to carry him at all unless he rides in an ordinary coach, is the colored citizen accorded "the equal protection of the laws" enjoyed by the white man and the unabridged privileges and immunities of citizenship which he enjoyed before this coach law was enacted? To me this question seems to bear its own answer, and after repeated readings of the opinion of the majority my mind still refuses to assent to any other than the negative answer to this question. The majority answer it in the affirmative. They argue that the railroad companies cannot afford to haul separate chair cars, sleeping cars, or dining cars for colored citizens and meet their complaint with the felicitous words, "the principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same."

But no separate chair cars, or sleeping cars, or dining cars for the members of the two races are required of the companies to enable them to give to colored citizens all the comforts and conveniences of travel which they furnish to the white citizens. They may furnish them in separate compartments in the same chair cars, sleeping cars and dining cars that are occupied by the whites and if this separate coach law of Oklahoma is unconstitutional they may provide the colored citizens with equal service in the same cars occupied by white persons without separate compartments.

56 Nor are the rights of citizens to unabridged privileges and immunities and to the equal protection of the laws measured by the expense or inconvenience to railroad companies that the existence and enforcement of those rights may entail. While the expense and inconvenience to the railroad companies of maintaining separate coaches and compartments for the two races is a matter worthy of serious consideration by a state when it is determining the question whether or not such a requirement is a reasonable exer-

cise of its police power, the constitutional rights of citizens to their privileges and immunities and to the equal protection of the laws are not dependent upon such considerations, nor upon the varying conditions and circumstances which may surround them.

As I understand the fourteenth amendment to the constitution, the purpose of its enactment, its express terms, and its legal effect, are to prohibit the conditioning of the privileges and immunities of citizens and the equal protection of the laws by the respective conditions and circumstances in which citizens may find themselves, and to secure to those suffering under adverse conditions and unfavorable circumstances the same civil rights and the same protection of the laws that the more fortunate and prosperous enjoy. Citizenship, and citizenship alone, under this amendment to the constitution entitles every man, white or black, to all his civil rights and privileges unabridged by the action or legislation of any state and to the equal protection of all the laws. Before the law, by the express terms of the fourteenth amendment, all citizens are equal in their civil rights and the humblest is the peer of the most powerful. It regards a citizen as a citizen and takes no account of his surroundings or of his color when his civil rights, as guaranteed by this the supreme law of the land, are involved.

Distances in the State of Oklahoma are magnificent, so great that the time necessarily occupied in many journeys within that State far exceeds twelve hours. Would one traveling through the day who was forbidden to purchase and take his dinner in a dining car upon his train which the railroad company furnished to his companion travelers be of the opinion that the service provided for him was equal in convenience or comfort to that furnished to his companions? Would one riding all night upon a train that carried a sleeping car who was legally expelled from or forbidden by law to enter or occupy it, believe that he was provided with equality of service, or equal comforts and conveniences with his companions who were permitted to purchase berths and beds therein? Is one who is excluded from a chair car with use of which his traveling companions are furnished, provided with the same or equal service, convenience and comfort with his companions? The complaint in this case is not that the state or the defendant railroad companies required white and colored citizens to occupy separate cars or separate compartments. It is that the State of Oklahoma by means of its separate coach law authorizes the defendants to deny to colored citizens facilities, comforts and conveniences substantially equal to those which they give to white citizens.

57 Under the common law and under the constitution of the United States before the enactment of this Oklahoma statute, railroad companies in that State were legally bound to furnish equality of service, comforts and conveniences of travel to white and colored citizens without discrimination against either. The colored citizen had the legal right to these facilities, comforts and conveniences and that right was as effectively protected by the law as was that of the white man. He had the same right as the white citizen

to the use of chair cars, dining cars and sleeping cars furnished by the carrier and any infringement of that right was as actionable and remediable as was the infringement of any white man's right to such a use.

The fourteenth amendment to the constitution provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." And that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This Oklahoma statute provides that the railroad companies in that State shall furnish separate coaches or compartments equal in points of comfort and convenience for the members of the white and the colored races (Section 1), that each coach or compartment shall bear letters indicating the race for which it is set apart (Section 2), that the railroad companies may haul sleeping cars, dining cars and chair cars set apart exclusively for white passengers or exclusively for colored passengers (Section 7), that any passenger who rides in any coach or compartment not designated for his race, after having been forbidden so to do by the conductor in charge of the train or car, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five nor more than twenty-five dollars (Section 6), that any conductor in charge of a train shall have authority to refuse any passenger admittance into any coach in which he is not entitled to ride under the act and that it shall be his duty to remove from the train or coach any passenger not entitled to ride therein, and that if he knowingly refuses to do so he shall be guilty of a misdemeanor and subject to a fine of not less than fifty nor more than five hundred dollars, and neither the company nor the conductor shall be liable for damages on account of any such removal (Section 10). Does not this law abridge the privileges and immunities held by colored citizens before its passage? They had the same right and privilege as white men to ride in chair cars, in sleeping cars and in dining cars before this law was passed and the railroad companies were liable in damages for any infringement of that right. This law deprives them of that right and privilege and subjects them to a fine of from five to twenty-five dollars for attempting to exercise it. For the railroad companies comply with this law when they set apart and mark for white passengers all their chair cars, all their dining
58 cars and all their sleeping cars and only furnish separate compartments equal to each other in points of comfort and convenience in coaches however inferior all these compartments and coaches may be in comfort and convenience to the chair cars, the sleeping cars and the dining cars. These separate compartments or coaches may be under this law so inconvenient and comfortless that no white passengers will use them, that all the white passengers will ride in the chair cars, or in the sleeping cars so that none but colored citizens can be found in the separate coaches or compartments. Nor may one readily wink so hard as not to perceive that this may be the

natural effect of this law, for if carriers may set apart all their chair cars for white passengers exclusively their separate compartments for white persons in coaches may be very restricted and the comforts and conveniences of these coaches very inferior.

Does this act deprive colored citizens of the equal protection of the laws? Before its passage colored citizens had the privilege and right to ride in the chair cars, the sleeping cars and the dining cars operated by the railroad companies and that right was protected by the law which gave them damages for its infringements. By the express terms of this statute that protection is withdrawn, they can recover no damages for any infringement of this civil right and they are subjected to fines of from five to twenty-five dollars for every attempt to exercise it. These considerations leave my mind no avenue of escape from the conclusion that this Oklahoma statute abridges the privileges and immunities of the colored citizens of that state and deprives them of the equal protection of the laws.

Nor is any authority cited by the majority in conflict with this conclusion. None of the laws considered in those cases, neither the statute of Louisiana, Laws of Louisiana, 1890, No. 111, page 152; Plessy v. Ferguson, 163 U. S. 537, nor the statute of Mississippi of March 2, 1888, which is considered in Louisville, etc., Railway Company v. Mississippi, 133 U. S. 587, 588, nor the act of Kentucky of May 24, 1892, Laws of Kentucky of 1891-1892-1893, Chap. 40, page 63, treated in Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, either authorized or permitted the railroad companies to deny to colored citizens accommodations equal in convenience and comfort to those provided for white citizens. None of these statutes either empowered or permitted railroad companies to exclude from their chair cars, or sleeping cars, or dining cars all colored citizens or to deprive colored passengers of the same right that the white passengers had to equal accommodations or to legal protection for that right. On the other hand, each of these statutes expressly required the accommodations to the citizens of the two races to be equal and the Kentucky statute prohibited any "difference or discrimination in the quality, convenience or accommodations in the cars or coaches set apart for white and colored passengers." Section 2.

In Plessy v. Ferguson, 163 U. S. 537, the Supreme Court held only that the Louisiana statute which expressly required the
59 accommodations furnished by the carriers to colored citizens to be equal to those provided for white citizens, was not unconstitutional because it required railroad companies to carry the members of the two races in separate coaches or compartments.

The cases of Louisville, etc., Ry. Co. v. Mississippi, 133 U. S. 587, and Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, were prosecutions of railroad companies for failure to provide separate coaches under the Mississippi and Kentucky statutes cited above, and neither of them presented any question of the rights of colored passengers under the fourteenth amendment or under the statutes themselves, as is clearly stated by the Supreme Court in 133 U. S., at page 589, in these words:

"It will also be observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train, and hence there is no question of personal insult or alleged violation of personal right."

In Chiles v. Chesapeake & Ohio Ry. Co., — U. S., —, 30 Supreme Court Reporter 667, the only question presented was whether or not a railroad company in the absence of statutory authority might lawfully separate white from colored passengers on condition that it furnished them equal accommodations, and its right so to do was upheld. The fourteenth amendment is levelled only at the action of a state and as no state action was in question in this case the rights and privileges of colored citizens under that amendment were neither considered nor adjudged.

The Oklahoma statute expressly authorizes every railroad company doing business in that state, by its mere arbitrary will, to mark all its chair cars, all its sleeping cars and all its dining cars hauled in that State for white persons exclusively and to provide none for colored persons, or to mark them all for colored persons exclusively and to haul none for white persons. It thereby authorizes any such railroad company to deprive all passengers for whom it does not mark these classes of cars of the privilege and right to use them which they had before this act was enacted, of the equal protection of that right by the laws, which they had before that act was passed, and subjects them to a fine for attempting to exercise this right. Suppose the railroad companies doing business in Oklahoma should mark all their chair cars, all their sleeping cars and all their dining cars for colored passengers exclusively, should exclude all white passengers therefrom and should provide no cars of these classes for white passengers in the same way that they now designate all such cars for white passengers exclusively, exclude colored passengers and haul no cars of these classes for colored passengers, would any one conceive that white passengers were furnished with equality of service with colored passengers, or that their privileges and immunities were not abridged by this law, or that they were not deprived of the equal protection of the laws thereby, when in this way they would be deprived of all protection of their
60 previous right and privilege to the equal use of such cars and made liable to fine for attempting to exercise that right, while the same right and privilege of colored persons to that use would remain undisturbed and securely protected by the law?

The validity of this statute under the fourteenth amendment is not conditioned by the character of the parties empowered to determine what citizens may use the chair cars, the sleeping cars and the dining cars. It is not conditioned by the answer to the question whether such parties are public officials or private citizens. Nor is it conditioned by the manner of the exercise of this power or by the answer to the question whether it is exercised fairly and justly or "with an evil eye and an unequal hand." For the proposition is self evident that whenever a privilege and right of person or of property, whenever any civil right of any persons or of any class

of persons, or its legal protection is made dependent by law upon the arbitrary will of third persons, that right is not only abridged but it is destroyed, it is no longer a right, and the equal protection of the law is entirely withdrawn from it.

While the Supreme Court in Yick Wo v. Hopkins, 118 U. S. 356, held at page 373, that "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Yet it had also held in the earlier part of the opinion in that case that an ordinance of the City of San Francisco violated the fourteenth amendment of the constitution and was void because it made the right and privilege of citizens to conduct laundries in that State dependent upon the arbitrary will of the Board of Supervisors. It supported that conclusion by extended argument and numerous authorities and said:

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." 118 U. S. 369, 370.

This statute which authorizes railroad companies at their arbitrary will to deprive citizens of their civil rights, which takes away all remedy for such a deprivation and subjects those so deprived to fines for endeavoring to enforce those rights, is as obnoxious to the Constitution as a law which directly destroys them.

The true interpretation of the fourteenth amendment is to be found in the decisions of the Supreme Court when it was
61 composed of those great jurists who had been active in public affairs when it was proposed and enacted and who could not fail to know its purpose and its meaning. In Strauder v. West Virginia, 100 U. S. 303, 306, that court said:

"This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed. * * * They especially needed protection against unfriendly action in the states where they were resident. It was in view of these considerations the fourteenth amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privilege of citizenship to persons of color,

but it denied to any state the power to withhold from them the equal protection of the laws and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that a law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy and discriminations which are steps towards reducing them to the condition of a subject race."

This separate coach law of the State of Oklahoma, with its specious requirement that the separate coaches or compartments it requires shall be "equal in all points of comfort and convenience, with its actual provision that colored citizens may be excluded without remedy by carriers from all the more comfortable and convenient cars they haul upon their trains in Oklahoma, from the chair cars, from the sleeping cars and from the dining cars, with its deprivation of colored passengers of their privilege and right which they had before this law was enacted, to ride in and use such cars and their comforts and conveniences equally with white passengers, with its deprivation of the protection of that right by the laws which white passengers still enjoy, and with its imposition of fines for attempting to enforce their equal right, in my opinion defies the spirit, defeats the purpose, violates the express prohibition of the fourteenth amendment, is unconstitutional and void. And as the com-
62 plainants allege in their bill and the demurrers admit that the defendants under the authority of this law are continually depriving, and will continue to deprive, these complainants of these rights secured to them by this amendment, unless they are enjoined by the courts, I am unable to escape the conclusion that they are entitled to an injunction to prevent what seem to me to be acts whose only, but futile, excuse is this law of the state which violates the constitution.

This view of the case renders unnecessary any discussion of the question whether this statute is void because it constitutes a breach of the contract between the people of the State of Oklahoma and the people of the Nation made by the latter's acceptance of the condition of their admission as a state prescribed by Section 3 of the Enabling Act, Statutes of Oklahoma, 1909, page 50, that "The constitution shall be republican in form and shall make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the

principles of the Declaration of Independence." But I do not desire to be deemed to assent to any proposition that any terms of the contract between the State and the Nation made at the time of its admission may be violated by the former with impunity after the acceptance of its constitution and its admission into the union. That question was much debated sixty years ago, without as — within the courts. Leaving it aside here, the fact that the enabling act required, and the people of Oklahoma assented, to the agreement that there should be no distinction between civil and political rights on account of race or color in that State is very persuasive that they and the Congress of the United States understood this to be the substantial meaning of the Constitution of the United States, and in my opinion no such distinction should now be permitted to be perpetuated.

There is another reason why the bill in this case should be sustained. The majority concede that this separate coach law violates the commercial clause of the constitution if it embraces or relates to interstate commerce at all. Hall v. DeCuir, 95 U. S. 485; County of Mobile v. Kimball, 102 U. S. 691-697; Brown v. Houston, 114 U. S. 622; Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557, 566-577; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 488-499.

By its express terms which are free from all ambiguity it applies to all commerce in the transportation by railroad of passengers in the State of Oklahoma, to interstate to the same extent as to intrastate commerce, to passengers who are brought into, to those who are carried out of, and to those who are carried through the state to the same extent as to those who are transported only within its borders. And it is a penal statute which subjects the former as well as the latter to fines for its violation. It first provides that every railroad company doing business in that State shall furnish separate coaches and waiting rooms for the white and negro races and then contains the following enactments which must be amended by judicial construction by the insertion of the words con-
63 tained in the parentheses below or by words of similar import in order to exclude interstate commerce from its terms and effect.

"It shall be unlawful for any person (except passengers who are brought into, or carried through, or out of the State of Oklahoma), to use, occupy or remain in any waiting room, toilet room, or at any water tank in any passenger depot in that State set apart to a race to which he does not belong." Section 2.

"The term negro as used herein includes every person of African descent as defined by the Constitution" (except passengers who are brought into, or carried through, or out of the State of Oklahoma). Section 3.

"If any passenger (except passengers brought into, or carried through, or out of the State of Oklahoma), upon a railway train, * * * shall ride in any coach, or compartment not designated for his race, after having been forbidden to do so by the conductor of the train or car, or shall remain in any waiting room not set apart for the race to which he belongs, he shall be guilty of a misdemeanor

and upon conviction shall be fined not less than five nor more than twenty-five dollars. Should any passenger (except passengers brought into, or carried through, or out of the State of Oklahoma), refuse to occupy the coach or compartment or room to which he or she is assigned by the officer of such railway company, said officer shall have the power to refuse to carry such passenger on his train, and should any passenger (except passengers brought into, carried through, or out of the State of Oklahoma), or any other person not a passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room, said agent shall have power, and it is made his duty, to eject such person from such room, and for such neither they nor the railroad company which they represent, shall be liable for damages in any courts of this State." Section 6.

* * * "Provided nothing herein contained shall be construed to prevent any railway companies in this State from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly." (Except that all such cars shall be equally open to the joint use of those white and negro passengers who are brought into, carried through, or out of the State of Oklahoma.) Section 7.

When the Supreme Court of a state has construed or has clearly indicated by its decisions that it will interpret a statute of a state that by general terms embraces subjects within and without the constitutional power of the state to be limited in its meaning and effect to the former, that construction necessarily prevails in all the courts of the state and practically amends the statute and restricts its practical operation and effect to subjects within the constitutional power of the state. As no rights of citizens of the United States under its constitution are or can be injuriously affected by a statute thus limited the Supreme Court of the United States and this court have held that a state law thus amended by judicial legisla-
64 tion and limited by the highest court of the state that enacted it may be permitted to stand although it would have been unconstitutional and void if the Supreme Court of the state that enacted it had interpreted it to embrace subjects without as well as within the constitutional power of the state, or if in the absence of construction by the highest court of the state it embraced such subjects by its terms under the established canons of interpretation. This, and this only, as I understand them, is the meaning and the legal effect of the decisions relative to this question in Louisville, etc., Ry. Co. v. Mississippi, 133 U. S. 587, 591; Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 395 and Butler Bros. Shoe Co. v. United States Rubber Company, 84 C. C. A. 167, 185, 156 Fed. 1, 19, cited by the majority. In each of these cases the Supreme Court of the state had either expressly interpreted, 133 U. S. 591, or had indicated that it would interpret, 179 U. S. 395, 156 Fed. 19, the statute in question to be limited in its meaning and effect to the subjects within the constitutional power of the state. These decisions, however, fail to consider or to determine, as it seems to me, the question which the statute in hand presents. The Supreme Court of Okla-

homa has not construed, restricted, or limited this law, nor has it given any intimation that it will ever do so. If, when this statute comes before that court for construction, it holds that this law means what it clearly and repeatedly declares, that every passenger whether interstate or intrastate is subject to its provisions and its fines, the statute is unquestionably violative of the commercial clause of the constitution and void. And in the absence of any construction by that court this statute must be equally violative of the constitution if its true interpretation and effect is to subject inter-state passengers to its provisions and penalties. We are, therefore, remitted in the consideration and decision of this case to the law and to the established rules for the construction of statutes for an answer to the question whether or not the national courts may be judicial construction amend a statute which in plain terms applies without discrimination to subjects without and subjects within the constitutional power of the state so as to exclude the former and include the latter in order to take the law out from under the ban of the constitution. This question, under circumstances similar to those under which this statute comes before this court, has been repeatedly answered by the Supreme Court and by this court.

In United States v. Reese, 92 U. S. 214, 218, 221, 23 L. Ed. 563, Congress had enacted a law which prescribed punishment for the unlawful refusal to accept votes from all voters while its constitutional power was limited to prescribing the penalty for refusing to receive votes "on account of the race, color, or previous condition of servitude of the voter." The contention of the government was that the act was constitutional as to all refusals to receive votes on account of the race, color, etc., of the voter, and that it could be sustained to this extent and permitted to fail in other cases, because the two classes of cases and the two portions of the act applicable to them were readily separable. But the argument failed.

65 The Supreme Court said:

"We are therefore directly called upon to decide whether a penal statute, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

In Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, Congress possessed the constitutional authority to protect trade-marks in in-

terstate and foreign commerce, and it enacted a statute which by its terms protected trade-marks in all commerce. The court was urged to restrict this law by construction to trade-marks in interstate and foreign commerce and to sustain it. But it cited and quoted from the opinion in the Reese Case, and held the act unconstitutional.

In Virginia Coupon Cases (Poindexter v. Greenhow), 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, the same argument was again met and overthrown with this declaration, which was subsequently quoted and affirmed in Income Tax Cases (Pollock v. Farmers Loan & Trust Co.), 158 U. S., at page 636, 15 Sup. Ct., at page 920 (39 L. Ed. 1108):

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In Spraigue v. Thompson, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115, the Legislature of Georgia had enacted a statute which would have been valid if it had not contained certain unconstitutional exceptions. The Supreme Court of that state sustained it upon the ground that the body of the act was readily separable from the exceptions. The Supreme Court reversed that decision and said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the
66 section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

In Chicago, Milwaukee & St. Paul Ry. Co. v. Westby, 102 C. C. A. 65, 78, 178 Fed. 619, 632, the same question came before this court under circumstances similar to those presented in the case at bar, and after a review of the foregoing authorities, and many others, it held that, "A statute of a state which includes by general language in a single class those within and those without the constitutional class may not be limited by judicial construction to the latter class and then sustained."

While it is true that where a statute is constitutional in part and unconstitutional in part, the former part in proper cases may be sustained, while the latter part fails, yet indispensable conditions of

such a result are: (1) That the constitutional part and the unconstitutional part are capable of separation so that each may be read and may stand by itself (Baldwin v. Franks, 120 U. S. 679, 685, 686, 7 Sup. Ct. 656, 30 L. Ed. 766); and the constitutional and unconstitutional parts of this statute are so consolidated in its terms which are made applicable to "every passenger" and "every railroad company" without distinction between interstate and intrastate passengers, that such a separation is impossible; (2) that the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and to give effect to the former only, Allen v. Louisiana, 103 U. S. 80, 84, 26 L. Ed. 318; United States v. Reese, 92 U. S. 214, 218, 221, 23 L. Ed. 563; The Trade-Mark Cases, 100 U. S. 82, 99, 25 L. Ed. 550; United States v. Harris, 106 U. S. 629, 641, 642, 1 Sup. Ct. 601, 27 L. Ed. 290; Virginia Coupon Cases (Poindexter v. Greenhow), 114 U. S. 270, 305, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Spraigue v. Thompson, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115; Income Tax Cases (Pollock v. Farmers' Loan & Trust Co.) 158 U. S. 601, 636, 15 Sup. Ct. 912, 39 L. Ed. 1108; Cella Commission Co. v. Bohlinger, 78 C. C. A. 467, 471, 147 Fed. 419, 423, 8 L. R. A. (N. S.) 537; Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 South. 554, 555, 62 L. R. A. 407, 95 Am. St. Rep. 476; and the statute in hand cannot be be so amended by the omission of words or terms or in any other way than by the insertion thereof. Witness the section quoted above and the words and terms set forth in the parentheses which are requisite to conform the statute to a constitutional enactment; (3) that the unconstitutional part is not so connected with
67 the general scope of the law that the court cannot clearly see that the Legislature would have enacted and intended to give effect to the constitutional part, although the unconstitutional part was stricken out. To my mind this statute clearly discloses that the patent intention of the Legislature of Oklahoma was to exclude not only colored intrastate passengers, but every colored passenger from the coaches and cars occupied by white persons. The statute would have failed of its entire purpose if interstate colored passengers had not been excluded thereby, for a part of the colored passengers in the coaches and cars occupied by the white persons were as obnoxious to the Legislature as all of them. The members of the Legislature never had any intention to pass any law that would have secured or permitted such a result and it is far from clear that they would have passed the statute with an exception of interstate passengers. This conclusion is sustained not only by the reason of the case, but by the established rules for the interpretation of the statute itself. Its terms are unambiguous and its meaning evident. It subjects "every passenger" to its provisions and penalties. Where a statute is unambiguous and its meaning is evident it must be held to mean what it clearly expresses and no room is left for construction. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185; Brun v. Mann, 151 Fed. 145, 157.

The fact that the legislature subjected "every passenger" to the provisions of the law and made no exception of interstate passengers

raises a conclusive legal presumption that they intended to make no such exception, and in my opinion it would be unjustifiable judicial legislation for the courts to do so. Cella Commission Co. v. Bohlinger, 78 C. C. A. 467, 473, 147 Fed. 419, 425, 8 L. R. A. (N. S.) 537; Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 12 L. R. A. (N. S.) 736; Madden v. Lancaster County, 12 C. C. A. 566, 572, 65 Fed. 188, 194; Wrightman v. Boone County, 31 C. C. A. 570, 572, 88 Fed. 435, 437; Union Central Life Ins. Co. v. Champlin, 54 C. C. A. 208, 210, 116 Fed. 858, 860. It seems to me that this statute cannot be restricted lawfully by construction to intrastate passengers because the part applicable to that class is not separable from the part applicable to the unconstitutional class, the interstate passengers, so that each part may be read and may stand by itself, because it is not apparent that the Legislature would have passed the act if it had been limited to the constitutional class, but it is plain that they would not have done so, because the Legislature excepted neither class, and the legal presumption is that it intended to except none, because the statute cannot be restricted to the constitutional class by the elimination of words or clauses, that result can be attained only by the introduction into it of express terms or words, and because its terms are plain and its meaning is evident and it ought not to be construed to mean that which it does not express. In view of these considerations, rules and authorities my opinion is that the separate coach law of Oklahoma applies to interstate passengers and interstate commerce to the same extent that it does to intrastate passengers and commerce and that for
68 that reason it is violative of the commercial clause of the constitution and void. For the reasons which have now been stated, at perhaps too much length, I think that the decree below should be reversed, that the demurrers of the defendants should be overruled and that they should be required to answer the bill.

Filed February 10, 1911.

69 (*Decree.*)

And on the tenth day of February, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3054.

FRIDAY, *February* 10, 1911.

E. P. MCCABE, J. T. JETER, JOHN W. CAPERS, and S. G. GARRETT, Appellants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation; The St. Louis and San Francisco Railroad Company, a Corporation; The Missouri, Kansas and Texas Railway Company, a Corporation; The Chicago, Rock Island and Pacific Railway Company, a Corporation, and The Fort Smith and Western Railroad Company.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The Atchison, Topeka and Santa Fe Railway Company, a corporation, The St. Louis and San Francisco Railroad Company, a corporation, The Missouri, Kansas and Texas Railway Company, a corporation, The Chicago, Rock Island and Pacific Railway Company, a corporation, and The Fort Smith and Western Railroad Company have and recover against E. P. McCabe, J. T. Jeter, John W. Capers and S. G. Garrett the sum of twenty dollars for their costs herein and have execution therefor.

February 10, 1911.

70 (*Motion for Order Staying Mandate.*)

And on the tenth day of April, A. D. 1911, a motion for an order staying the issuance of the mandate was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

E. P. McCabe, J. T. Jeter, John W. Capers, and S. G. Garrett, Complainants,

vs.

The Atchison, Topeka & Santa Fe Railway Company, a Corporation; The St. Louis & San Francisco Railroad Company, a Corporation; The Missouri, Kansas & Texas Railway Company, a Corporation; The Chicago, Rock Island & Pacific Railway Company, a Corporation; The Fort Smith & Western Railroad Company, a Corporation, Defendants.

Come now the complainants above named and move the Court to with-hold the mandate in the above entitled cause, the decision in which was rendered by this Court on the 10th day of February, 1911, and to allow these complainants additional time within which to perfect their appeal from this Court to the Supreme Court of the United States.

WILLIAM HARRISON,
Solicitor for Complainants.

(Endorsed:) No. 3054. E. P. McCabe, et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Company, et al. Motion for order staying issuance of mandate. Filed Apr. 10, 1911, John D. Jordan, Clerk.

(*Order Staying Issuance of Mandate.*)

And on the tenth day of April, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order staying the issuance of the mandate in said cause, in the words and figures following, to-wit:

71

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

Monday, *April* 10, 1911.

No. 3054.

E. P. McCabe et al., Appellants,

vs.

The Atchison, Topeka and Santa Fe Railway Company et al.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Upon application of the appellants this day presented, it is hereby ordered that the issuance of the mandate in this cause to the Circuit

Court of the United States for the Western District of Oklahoma, be, and the same is, hereby stayed for a period of sixty days from this date.

April 10, 1911.

(*Application of Appellants for Additional Stay of Mandate.*)

And on the eighth day of June, A. D. 1911, an application of appellants for an additional stay of the mandate was filed in said cause, in the words and figures following, to-wit:

OKLAHOMA CITY, OKLA., *June* 4, 1911.

Hon. John D. Jordan, Clerk of U. S. Circuit Court of Appeals, St. Louis, Mo.

DEAR SIR: Cannot perfect the appeal in the case of McCabe et al. vs. Atchison, Topeka and Santa Fe Ry. Co. et al. by the 12th inst. Desire 30 days additional. Have the court allow the same and wire me at my expense.

WILLIAM HARRISON.

(Endorsed:) No. 3054. E. P. McCabe, et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Co., et al. Application of Appellants for additional stay of mandate for 30 days from June 10, 1911. Filed Jun- 8, 1911, John D. Jordan, Clerk.

72 (*Order Granting Further Stay of Mandate.*)

And on the eighth day of June, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order granting a further stay of the mandate in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911.

THURSDAY, *June* 8, 1911.

No. 3054.

E. P. McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO. et al.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Upon consideration of the application of counsel for appellants for an order further staying the mandate herein, it is now here ordered by this Court, that the mandate in this cause, be, and the same is hereby, stayed until and including the tenth day of July, 1911.

(*Petition for and Order Allowing Appeal to Supreme Court, U. S.*)

And on the fifteenth day of July, A. D. 1911, a petition for and order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

EDWARD McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO., Appellee.

Petition for Appeals.

The above named appellants—conceiving themselves aggrieved by the decree made and entered on the 10th day of February 1911, in the above entitled cause, affirming with costs the decree of the Circuit Court of The United States for The Western District
73 of Oklahoma, do hereby appeal from said order and decree to the Supreme Court of The United States, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The Appellants respectfully represent that the law gives them of right an appeal of this case to the Supreme Court of the United States from the order and decree of the United States Circuit — of Appeals, Eighth Circuit, and for the Western District of Oklahoma aforesaid; that the case is one in which the jurisdiction is not entirely dependent upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; that the case does not arise under the Patent Laws; that it does not arise under the Revenue Laws; that it does not arise under the Criminal Laws; and that it is not an Admiralty Case; And that the matter in controversy involves a Federal question.

WILLIAM HARRISON,
E. T. BARBOUR,
E. O. TYLER,
Counsel for Appellants.

Upon consideration of the foregoing petition and of the assignment of errors presented herewith—it is now here ordered that an appeal to the Supreme Court of the United States, be, and the same is hereby allowed as prayed for in said petition.

Dated July 15, 1911.

WALTER I. SMITH,
Judge of The United States Circuit Court of Appeals.

(Endorsed:) No. 3054. Edward McCabe, et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Co., et al., Appellees.

Petition for and Order Allowing Appeal to Supreme Court U. S. Filed Jul- 15, 1911. John D. Jordan, Clerk. Wm. Harrison, E. T. Barbour, E. O. Tyler, Solicitors for Appellants.

74 (*Assignment of Errors on Appeal to Supreme Court, U. S.*)

And on the fifteenth day of July, A. D. 1911, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

EDWARD McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO. et al., Appellee.

Assignment of Errors.

Come now the above named Appellants by William Harrison, E. T. Barbour and E. O. Tyler, their Counsel, and say that in the record and proceedings in the above entitled cause there is manifest error, in this, to wit:

(1) The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the decree of the United States Circuit Court for the Western District of Oklahoma, entered on the 10th day of February, 1911, affirming the decree of the United States Circuit Court for The Western District of Oklahoma entered on the 7th day of September, 1908, sustaining the demurrer to Bill of Appellants and dismissing the Bill of Appellants.

(2) That the said Court erred in holding and deciding that the Oklahoma Statute is not in itself discriminatory and does not operate to deprive the Negro Race of the equal protection of the laws within the meaning of the Constitution.

(3) The said Court erred in holding and deciding that the general principle of equality of service which pervades the Oklahoma Statute is observed by the Appellees and each of them herein.

(4) That said Court erred in holding and deciding that the provisions of the Oklahoma Statute do not amount to a regulation of Inter-State Commerce.

(5) That the said Court erred in assuming, holding and deciding that the provisions of the Oklahoma Statute do not expressly indicate or apply to Inter-State Commerce.

75 (6) That the said Court erred in holding and deciding that all of the provisions of the Oklahoma Statute referring or applying to Inter-State Commerce are general.

(7) That said Court erred in holding and deciding that the Act of Oklahoma is not violative of the Commerce Clause of the Constitution.

(8) The Court erred in holding and deciding that the allegations in Appellants' Bill in Equity are too vauge and uncertain to constitute a cause of action either in equity or at law.

(9) That the said Court erred in assuming deciding and holding that the Legislature of Oklahoma knew that legislation affecting Inter-State Commerce was beyond its power.

(10) That the Court erred in holding and deciding that the working obligation or instructions imposed by The Enabling Act ceased to have force or effect when the Instrument—The Oklahoma Constitution was made and found and proclaimed by the Constituted Umpire to be in accordance with the Act which authorized it.

(11) That said Court erred in holding and deciding that section (22) of the Enabling Act does not afford any additional warrant for their contention, the contention of Appellants.

(12) That said Court erred in holding and deciding that the Statute in question does not violate the 14th Amendment to the Constitution of The United States.

Wherefore Appellants pray that the decree of the United States Circuit Court of Appeals, Eighth Circuit, be in all things reversed.

Signed this 5th day of July, 1911.

WILLIAM HARRISON,
E. T. BARBOUR,
E. O. TYLER,
Counsel for Appellants.

(Endorsed:) No. 3054. Edward McCabe, et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Co., et al., Appellees. Assignment of Errors on Appeal to Supreme Court, U. S. Filed Jul- 15, 1911. John D. Jordan, Clerk. Wm. Harrison, E. T. Barbour, E. O. Taylor, Counsel for Appellants.

76 (*Bond on Appeal to the Supreme Court of the United States.*)

And on the fifteenth day of July, A. D. 1911, a bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

Bond.

EDWARD MCCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY Co. et al., Appellees.

Know all men by these presents, that we—Edward McCabe, James Troy Jeter, John Wesley Capers, and Sam Garrett—as principals and Thos. Traylor of Oklahoma County, State of Oklahoma, and Charles A. Buchanan, of Logan County State of Oklahoma as sureties—are held and firmly bound unto The Atchison, Topeka & Santa Fe Railway Company, a corporation; The St. Louis & San Francisco Railroad Company, a corporation; The Missouri, Kansas & Texas Railway Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation; and The Fort Smith & West-

ern Railroad Company, a corporation in the full and just sum of $600.00 (Six Hundred Dollars) good and lawful money of the United States, to be paid to the said Defendant above named, to their successors, or assigns, to which payment, well and truly to be made, we bind ourselves heirs, executors, and administrators, jointly and severally by these presents.

Seal- with our seal this 6th day of July, 1911.

Whereas the above named Appellants have obtained an appeal to the Supreme Court of The United States to reverse the order and judgment of The United States Circuit Court of Appeals, Eighth Circuit, made and entered on the 10th day of February, 1911;

Now, therefore, the conditions of this obligations are such that if the above named Appellants shall prosecute said Appeal to effect and answer all damages and costs, if they fail to make said
77 appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Witness our hands and seal- this 6th day of July, 1911.

EDWARD McCABE,
JAMES TROY JETER,
JOHN WESLEY CAPERS.
SAM GARRETT.
By WILLIAM HARRISON, *Solicitor.*
CHAS. A. BUCHANAN, *Surety.*
THOS. TRAYLOR, *Surety.*

Signed, sealed, in the presence of:

—— ——.

Signed by Charles A. Buchanan and Thos. Traylor, Sureties, in the presence of and acknowledged before me this 6th day of July, 1911.

[SEAL.] HARRY L. FINLEY,
Clerk U. S. Circuit Court, Western District Okla.
——— ———, *Deputy.*

The above bond is hereby approved and ordered made a part of the record this 15 day of July, 1911.

WALTER I. SMITH,
Judge of the United States Circuit
Court of Appeals for the Eighth Circuit.

Justification of Sureties on Bond.

In the United States Circuit Court of Appeals, Eighth Circuit.

EDWARD McCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO. et al., Appellees.

I, Thos. Traylor being first duly sworn upon my oath doth depose and say: I am a resident of the County of Oklahoma, State of Okla-

homa; I am of lawful age and a citizen of the United States;
78 I am a free holder in the said State; I am worth the sum of $5,000.00, Five Thousand Dollars consisting of the following property located and situated in Oklahoma County, Oklahoma, to-wit: It being lot- Nos. (7) and (8) Seven & Eight, in Block No. (12) Twelve, in South Oklahoma worth the sum of $4,000.00. That the property heretofore listed is unincumbered. That all of my debts amount to $—— (——.) That I am neither principal nor surety on any other bond except—None—amounting to $—. I am the person who signed the bond in the above styled case.

THOS. TRAYLOR.

Subscribed in my presence and sworn to before me this 6th day of July, 1911, after the foregoing affidavit was read to him in full by me.

[SEAL.] HARRY L. FINLEY,
Clerk U. S. Circuit Court, West. Dist. Oklahoma.

In the United States Circuit Court of Appeals, Eighth Circuit.

EDWARD MCCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO. et al., Appellees.

I Charles A. Buchanan being first duly sworn upon my oath depose and say: I am a resident of the County of Logan, State of Oklahoma; I am of lawful age and a citizen of the United States; I am a free holder in the said State; I am worth the sum of $1,600, Sixteen Hundred Dollars, consisting of the following property located and situated in the County of Logan, State of Oklahoma, to-wit: It being Lots (20), (21) and (22) Twenty, Twenty One & Twenty Two, Block (84) Guthrie Proper worth the sum of $1,600.00, Sixteen Hundred Dollars. That the property heretofore listed is unincumbered. That all my debts amount to $—, — Dollars. That I am neither principal nor surety on any other bond except—— None——. I am the person who signed the bond in the above styled cause.

CHARLES A. BUCHANAN.

79 Subscribed in my presence and sworn to before me this 6th day of July, 1911.

[SEAL.] HARRY L. FINLEY,
Clerk U. S. Circuit Court, West. Dist. of Okla.

(Endorsed:) No. 3054. E. P. McCabe et al. Appellants, vs. The Atchison, Topeka and Santa Fe Railway Co. et al. Bond on Appeal to the Supreme Court of the United States. Filed Jul- 15, 1911, John D. Jordan, Clerk.

(*Citation.*)

And on the seventh day of August, A. D. 1911, a citation on appeal to the Supreme Court of the United States was filed in said cause, the original of which with proof of service is hereto attached and herewith returned:

80 UNITED STATES OF AMERICA:

To The Atchison, Topeka and Santa Fe Railway Company, a corporation, The St. Louis and San Francisco Railroad Company, a corporation, The Missouri, Kansas and Texas Railway Company, a corporation, The Chicago, Rock Island and Pacific Railway Company, a corporation, The Fort Smith and Western Railroad Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed by the United States Circuit Court of Appeals for the Eighth Circuit, wherein E. P. McCabe, J. T. Jeter, John W. Capers and S. G. Garrett, are Appellants, and you are Appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter I. Smith, one of the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, this 15 day of July, A. D. 1911.

WALTER I. SMITH,
United States Circuit Judge for the Eighth Circuit.

81 In the case of McCabe et al. vs. The Atchison, Topeka & Santa Fe Ry. Co. et al. the original citation hereto attached was served on me this 26 day of July, 1911, and I hereby acknowledge service for the Atchison, Topeka & Santa Fe Ry. Company, a corporation, this 26 day of July, 1911.

S. T. BLEDSOE.

I hereby accept service of the original citation hereto attached and made a part hereof this 27th day of July, 1911, the same being accepted for the Chicago, Rock Island and Pacific Ry. Company, a corporation.

H. B. LOW.

I hereby accept service of the original citation hereto attached and made a part hereof this — day of July, 1911, and the same is accepted for the Missouri, Kansas and Texas Ry. Co., a corporation, the day and date herein above set out.

——.

I hereby accept service of the original citation hereto attached and made a part hereof this 1st day of Aug., 1911, the same being

accepted for the Fort Smith & Western Railroad Company, a corporation, this 1st day of Aug., 1911.

C. E. WARNER &
DOLE, BRIAN & HUGHES.

I hereby accept service of the original citation hereto attached and made a part hereof this 26 day of July, 1911, and the same is hereby accepted for the St. Louis and San Francisco Ry. Company, a corporation.

R. A. KLEINSCHMIDT.

82 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3054.

EDWARD MCCABE et al., Appellants,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO. et al., Appellees.

William Harrison of lawful age b-ing first duly sworn upon his oath deposeth and says: I am a duly licensed and regularly practicing Lawyer of this State. I personally served the original of the citation herein up-n the Assistant Superintendent of the Missouri-Kansas and Texas Railway Company this 5th day of August, 1911, and left a copy of said citation with the clerk of the office of the Superintendent of said Missouri-Kansas and Texas Railway Company in Oklahoma City, County of Oklahoma and State of Oklahoma this 5th day of August, 1911. Affiant further saith: The original of said citation was also served upon the General Attorney of the said railway Company as his letter hereto attached and made a part hereof will show and further Affiant saith not.

WILLIAM HARRISON.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

William Harrison of lawful age being first duly sworn upon his oath deposeth and says: I am the Affiant above, I have read the foregoing statement and have signed the same of my own free and voluntary act and deed for the uses and purposes therein set forth and Affiant further saith that the contents of the said Affidavit are true and correct to the certain knowledge of this Affiant.

WILLIAM HARRISON.

Subscribed and sworn to before me this 5th day of August, 1911.
[SEAL.]

T. S. E. BROWN,
Notary Public.

My Notarial Commission Expires 2/14/14.

83 [Endorsed:] Supreme Court of the United States. No. —. October Term, 191-. E. P. McCabe et al., Appellants, vs. The Atchison, Topeka and Santa Fe Railway Co. et al. Citation and Proof of Service Thereof. Filed Aug. 7, 1911. John D. Jordon, Clerk.

84 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein E. P. McCabe et al., are Appellants, and The Atchison, Topeka and Santa Fe Railway Compny et al., are Appellees, No. 3054, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with proof of service thereof is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this Fifteenth day of August, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 22,898. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 111. E. P. McCabe, J. T. Jeter, John W. Capers and S. G. Garrett, Appellants, vs. The Atchison, Topeka & Santa Fe Railway Company et al. Filed October 9th, 1911. File No. 22,898.

In the Supreme Court of the United States

(22,898)

E. P. McCABE, J. T. JETER, JOHN W. CAPERS AND S. G. GARRETT,

Appellants,

vs. No. 16

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS

EL PASO AMERICAN 2-21-14.

ALPHABETICAL INDEX TO CASES.

SUPPLEMENTARY.

In the Supreme Court of the United States

(22,898)

E P. McCABE, J. T. JETER, JOHN W. CAPERS AND S. G. GARRETT,

Appellants,

VS. No. 111

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS

STATEMENT.

On February 15th, 1908, E. P. McCabe, et al., complainants and appellants herein, hereinafter designated as plaintiffs, commenced an action in the Circuit Court of the United States for the Western District, the Eighth Circuit of the District of Oklahoma, in equity, against the Atchison, Topeka and Santa Fe Railway Company, a corporation, et al.,

appellees, hereinafter designated as defendants; that thereafter, towit: leave of the Court having been first obtained, plaintiff in error filed their amended Bill in Equity in the 26th day if February, 1908.

For cause of action plaintiff in error alleges in substance that each and every one of said plaintiffs in error is a negro, and a descendant of the African race, and a resident and citizen of the Western District of Oklahoma, and that each and all of the said defendants herein above mentioned is a railroad corporation engaged in the transportation of freight and passengers for hire in the state of Oklahoma in the Western District thereof, and within the jurisdiction of this Court.

That each of the defendants, as common carriers of passengers it is the duty of such defendants and each of them to transport from place to place in said state of Oklahoma, and from points outside said state to points within, and from points within to points without, and to those who are carried thru said State of Oklahoma, all persons irrespective of their race or color, and without any distinction upon their payment of such rates and fares as required

by said company (defendants) under the commerce clause of the Constitution of the United States, Article one (1), section three (3), sub-section eight (8), which provides that Congress shall have exclusive power to regulate commerce between the States, with foreign nations, and with the Indian tribes, and that said act of the Legislature of the State of Oklahoma approved December 18th, 1907, is in violation of the said Constitution of the United States.

That by an Act of Congress of the United States of America, entitled "An Act to enable the people of Oklahoma and in the Indian Territory to form a constitution and State Government and to be admitted into the Union on equal footing with the original States," which act was approved on June 16th, 1906, it is among other things provided that the "Constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the constitution of the United States and the principles of the Declaration of Independence," which limitation in said act applies to the constitution and State Government of the State of Oklahoma.

That in pursuance of the power granted the Territory of Oklahoma and the Indian Territory by said act, the said two territories preceeded to adopt a constitution and have been admitted into the Union under and by virtue of said Act.

That notwithstanding the terms of said Act of Congress which have been adopted into and become a part of the constitution of the State of Oklahoma, the legislature of the State of Oklahoma passed an act entitled "An act to promote the comfort of passengers, etc.," which act was declared an emergency and was approve on the 18th day of December, 1907, and that said act of the State of Oklahoma is now being put into operation.

That said act among other things provides "that every railway company, urban or suburban company, etc., lessee, manager, etc., doing business in this state," (see act quoted in full —appendix A). That said act provides that separate waiting rooms and separate conveniences are to be provided on railway trains for the white and the colored races, and prevents any colored person or person of African descent from having any of the facilities provided for white persons and requires separate coaches or compartments for those of African des-

cent, and makes a distinction between persons of the white race and persons of the African descent.

That notwithstanding that said Act of Congress and of the Constitution of the State of Oklahoma, the said defendants above named are making distinction in the civil and private rights of the plaintiffs and all other persons of the Negro race and persons of the white race in the conduct and operation of its trains and passenger service in and thru the State of Oklahoma, in this to-wit: Equal comforts, conveniences and accomodation will not be and are not being provided for the plaintiffs and other persons of African descent; that said coach or compartment as defined by this act, are not so constructed or maintained so as to enable persons of African descent to be provided with separate and equal toilets and waiting rooms for male and female passengers of said Negro race, nor equal smoking car, separate chair car, sleeping car and dining car accomodations, and that said plaintiffs and other persons of African descent are not being and will not be provided with equal accomodations with the white race under the provisions of said law.

That said act of the legislature of Oklahoma as

approved December 18th, 1907, is repugnant to the laws of the United States in that it violates the provisions of said Act of Congress approved June 16th, 1906, in that said act makes a distinction and discriminates against the plaintiffs and those of African descent and deprives them of the equal protection of the law.

Plaintiffs further allege that the said act of the Legislature of Oklahoma as referred to is in conflict with the Fourteenth Amendment to the Constitution of the United States, because said law abridges the privileges and immunities of your plaintiffs and other persons of African descent who are citizens of the United States and deprives them of their rights, without due process of law.

That the acts and conduct of the defendants and each of them are being done under the provision of the Legislative enactment as above and hereinafter set out, and will be continuous, and work a hardship upon your plaintiffs and all persons of African descent desiring to travel on railroads doing business in this State, and that said plaintiffs will continue to be deprived, restricted and denied by reason of the express terms of the penal statute of all their rights as citizens, unless restrained and en-

joined from carrying out the injury, a multiplicity of suits will ensue, there being at least thirty thousand persons of the Negro race in Oklahoma who will be injured and deprived of their civil rights, etc., unless restrained.

The cause came on to be heard for the Western District of Oklahoma in and for the Eighth Circuit, on the temporary injunction, March 9th, 1908, the plaintiffs appearing in person and by their Counsel of record; the defendants and each of them being present and their respective counsel waived any and all objections to the Bill of plaintiffs, or as to the jurisdiction of the Court, misjoinder of parties, or the right of the plaintiffs to the relief in equity as prayed for in said petition. (That defendants asked leave until the following day to file answers to plaintiffs' complaint but agreed to proceed with the cause) this proceedings as indicated in brackets for some cause does not appear in the record.

The Attorney General of the State of Oklahoma was by the Court permitted to appear and present an argument to the Court, the defendants and their respective Counsel being present in open court did

not make any argument or otherwise appear than as above set out. That at the close of the arguments by counsel for plaintiff and counsel for defendants, the Court took the matter under advisement until the 24th day of March, 1908.

That thereafter, to-wit, on the 24th day of March, 1908, the Court denied and overruled plaintiffs' application for a temporary injunction, to which ruling finding and order of the Court, complainants, and each of them, duly excepted, and exceptions were by the Court allowed.

That thereafter, to-wit, on the 4th day of June, 1908, upon motion by plaintiffs, and sustained by the Court, that the bill of plaintiffs as filed against the defendants and each of them, be taken as confessed.

That thereafter, on the 8th day of July, 1908, said defendants, Atchison, Topeka and Santa Fe, filed a motion to set aside order *pro confesso*, and on the same day filed a demurrer. That on the —— day of July, the Missouri, Kansas and Texas Railway Company, one of the defendants filed a like motion and asked time to plead, etc.

That thereafter the Fort Smith and Western

Railway Company, and other of said defendants filed a like motion, etc.

To which the Court, upon all motions filed by said defendants made an order setting aside the order *pro confesso*, and that thereafter the said defendants filed their respective demurrers.

That said demurrers were duly set for hearing on the 7th day of September, 1908, the same being a regular judicial day of the June term, 1908, of said Court, comes on for hearing of the demurrers. The plaintiffs interposed a motion to strike said demurrers from the files, which was overruled and motion by plaintiffs for judgment by default against each of the defendants herein on the grounds that said demurrers were not properly verified; whereupon the Court overruled said motion, to which order and ruling of the Court the plaintiffs at the time excepted and except.

Thereupon argument of counsel was heard upon the said demurrers after which the Court sustained the demurrers. To which order of the Court sustaining the defendants and each of their demurrers, plaintiffs at the time excepted and except and elected to stand upon their bill of complaint, whereupon

the Court dismissed the bill of plaintiffs at their cost, to which judgment and decree plaintiffs at the time excepted and except. From the judgment entered in sustaining each of the defendants' demurrers and judgment and decree dismissing said bill of plaintiffs, and that thereafter the said plaintiffs conceiving themselves aggreived by the final decree, order and judgment entered in this cause on the 7th day of Sptember, 1908, duly filed their application for appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and which application was on the 12th day of February, 1909, in all things granted and the appeal allowed to the United States Circuit Court of Appeals as prayed for in said application, by the Honorable John H. Cotteral, Judge.

That said appeal was duly perfected and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit and filed April 19th, 1909, and the appearance of counsel for plaintiffs were duly filed on the said 19th day of April, 1909, all of which was duly entered of record by the Honorable John D. Jordan, Clerk.

That thereafter on the 4th day of May, A. D.,

1910, said day being a regular judicial day of the May, 1910, term of said Court, this cause being number 3054 and styled E. P. McCabe, et al., appellants, vs. The Atchison, Topeka & Santa Fe Railway Company, et al., appeal from the Circuit Court of the United States for the Western District of Oklahoma, being called for hearing in its regular order and motion of appellees to dismiss the appeal was called to the attention of the Court by counsel for appellees, and the hour of adjournment having arrived further proceedings were continued until the 5th day of May, A. D., 1910.

That on the 5th day of May, 1910, this cause was duly called for further hearing, and order being duly entered that said cause be submitted to the Court on the merits and the motion to dismiss. Argument on the merits and the motion to dismiss was commenced by counsel for plaintiffs, continued by defendants and concluded by plaintiffs.

That thereafter on the 10th day of February, A. D., 1911, the judgment and decree of said United States Circuit Court of Appeals for the Eighth Circuit was filed in this cause (by majority of said court) affirming the judgment and decree of the

Court below (the Circuit Court of the United States for the Western District of Oklahoma). From the judgment and decree entered in affirming the judgment and decree of the Circuit Court of the United States for the Western District of Oklahoma and for costs, plaintiffs bring this appeal

I.

Assignments 1 and 8.

The Court erred in holding that bills of complaints did not state facts sufficient to constitute a cause of action and require the defendants to answer further.

We here call attention of the Court that in the petition of plaintiffs there are ten causes of action stated therein, including the discovery part of the bill. The defendants filed a demurrer without attacking the charging part of the bill of complaints, or that of the discovery part, but file a demurrer to the entire bill or a general demurrer. We contend that a general demurrer raises the question of proper joinder of parties, and not as to whether the bill contains or states matters of equity that will

entitle the plaintiffs to the proper relief sought. We say further that the question of whether the bill states matters of equity or other relief sought can only be attacked by special demurrer.

The court in the case of *Consolidated vs. Combs*, 39 Fed. 29, held that general demurrer raises the question of misjoinder of parties. Same ruling in the sace of *Pacific vs. Hanley*, 98 Fed. 327.

The court further held in *Livingston vs. Story*, 9th Pet. 658, 9 L. Ed. 264, that when the discovery parts of a bill may be good, although the remainder is demurrable, and if so demurrer to the whole must be overruled. The Court also held in the case of *Grether vs. Wright*, 75 Fed. 742; *Ormsby vs. U. P. R. R.*, 4 Fed. 170, when raising the question as to the validity of the bill, that demurrer must be special and not general. We contend that the Court when setting aside the order *pro confesso* should have required the defendants and each of them to plead to the merits of the case.

The Court in the case of *Kimball vs. Stewart*, 1 McLean 332. Fed. Case No. 7682, and 19 Equity Rule Amended 1898, has said:

> "A default will be set aside on motion on condition that defendant plead to merits and go to trial."

Demurrer to the whole bill may be overruled if any part is good.

Livingston v. Story, 9 Peter 658, 9 L. Ed. 255.

Pacific R. R. Co. vs. Mo. P. R. R. Co., 111 U. S. 520, 288 L. Ed. 498, 4th Sup, Ct. Rep. 583.

Stewart vs. Matterson, 131 U. S. 158, 33 L. Ed. 114, 9 Sup. Ct. Rep. 682.

United States vs. Southern P. Co., 40 Fed. 611.

Merriam vs. Holloway P. Co., 8 Fed. 457. See Rule 39.

LaCroix vs. May, 15 Fed. 236.

Defendants Filed Their Demurrer Out of Time and Without Notice.

(Record, Court Below)

We must confess, under this assignment, that when it first came to our knowledge that said demurrer had been filed we were taken by surprise. However, we contend that under the condition of the

record in that an order *pro confesso* had been entered in the order book of the clerk's office and motion granted by the Court, and that more than thirty days had expired after the succeeding rule day within which said defendants had the right to file said motion to vacate the aforesaid order, but failed to file said motion within the time, we therefore contend that to both permit them to have said order vacated upon their motion, without notice to complainants, unless upon special causs shown, and then proceed to file their respective demurrers out of time and without notice to complainants, is indeed a wide departure from the rule.

Equity Rule 18. Equity Rule 32. *Richmond O. and Ry. Co.*, 64 Fed. 19.

The equity rule provides that

> "All motions or orders and other proceedings which are not grantable of course or without notice, shall, unless a different time be assigned by Judge of the Court, be made on a rule day, and entered in the order book and shall be heard at the rule day next after that on which the motion is made, and if the adverse party, or his solicitor, shall not then appear or shall not show good cause against the same, the motion may be heard by any Judge of the Court *ex parte*, and granted as if no objection, or refused in his discretion"

Equity Rule 6, Fed. Practice, Page 644, par. 197, See Modern Equity Pr., page 1077.

We therefore contend that motion to set aside the order *pro confesso* as filed by the defendants herein comes within the above rule, and that the Court, in vacating said order and without notice to plaintiffs, should have allowed said motion to stand until the preceding rule day next after the filing thereof, and that therefore the Court erred in vacating said order and allowing defendants to file the demurrers.

In support of this and for our further contention we recite the following facts that exist: That at the time of the hearing of the complainants' petition for temporary injunction the defendants, by their solicitors, appeared in open court and entered their appearance, each for themselves, and there in open court waived any and all objections to the bill of complaints. We recite further that the order was made by the Court then and there sitting, and the language was as follows: "The case was called for trial (in the Court below) and the Court required or made an order 'that each of the defendants file their answer by opening of Court the fol-

lowing morning,'" which order neither of the defendants conformed to.

Now we contend after the above proceedings were had that the defendants and each of them by their appearance and waiving any and all objections to the bill of complaints, and both sides presenting their case, that all of said defendants have answered the bill of complaints, and the case submitted to Court.

The Court in the case of *Newman vs. Moody*, 19 Fed. 858, held a demurrer filed without leave, and after answer and submission, is too late. With the rule announced in the matter of procedure, we contend that the Court erred in not requiring the defendants to answer further.

We further contend that the appearance of the Attorney General in the case is not a matter of record, and that it was not of that equitable or legal nature upon which the defendants can rely, in order to cure a default and file demurrer. As the well established maxim: "They slept on their rights."

The fact that the Attorney General appeared in the case cited, the judgment was held void for want of jurisdiction. *Brooks vs. Southern P. R. R. Co.*

Circuit Court decision 1906, reported in 148 Fed. 986, Vol. 1, Fed Cases, 1 to 564; case in point No. 48, *Hill vs. U. S.*, 50 U. S. 386.

It shall be the duty of the defendant, unless his time shall be otherwise enlarged, for cause shown by a Judge of the Court upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule day nevt succeeding that of entering his appearance. The demurrer may be filed, even after rule day, at any time before an order has been made directing the bill be taken *pro confesso* (2), or after such an order, by leave of the Court.

(2) *Daniell's Chr. Pr.* (2d Am. Ed.), 652-653. *Smith vs. Bryon*, 3 Mass. 428. *Foster Fed. Procedure*, Vol. 1, at p. 485-486, par 111.

The Court Erred in Rendering Judgment Against Plaintiffs and for Defendants.

We contend that the Court should have disregarded said demurrers and required defendants to answer further, and proceeded to trial upon the merits of the cause; that the bill of the plaintiffs does state facts sufficient to warrant relief in

equity as prayed for against defendants; that plaintiffs have, by reason of the judgment of the Court, been deprived of the right of due process of law in this, to show by competent evidence that all of the allegations alleged in plaintiffs' bill are true. We further contend that the Court, in dismissing said bill of complainants' fails to so do, with or without prejudice to the rights of plaintiffs, and therefore erred in rendering judgment against plaintiffs.

It has been held that a general demurrer for want of equity will not cover an objection to the discovery only. That, it was said, must be the subject of special demurrer. *Whittingham vs. Burgoyne*, 3 Am. St. 900. *Daniells vs. Ch. Pr.* (2d Am. Ed.), 656.

We will first consider the rule applicable to demurrers filed in the case at bar, and have the defendants complied with the rule? We contend that they have not, in that each of the defendants is a corporation doing business in the State of Oklahoma and having its president, secretary, etc., and as such general officers of the respective corporation is the defendant in action.

We call attention to the fact that in each of the

demurrers filed in the case at bar the respective counsels or solicitors have made the affidavit and certificate, all of which we contend is improper and not according to law and therefore should have been disregarded.

The Court in the case of *Sheffield Furnace Co. vs. Witherow*, 149 U. S. 574, has said:

> "No demurrer or plea is allowed to be filed to any bill unless by affidavit and upon certificate of counsel."

The Court in the cases hereinafter cited:

> "Plea or demurrer unaccompained by the proper certificate and affidavit should be disregarded."

American S. Co. vs. Wire Co., 90 Fed. 599.

Nat Bank vs. Ins. Co., 104 U. S. 55.

Preston vs. Finley, 72 Fed. 850.

Sheffield Furnace Co. vs. Witherow, 149 U. S. 574, 37 Law Ed. 853, 13 Sup. Ct. Rep. 936.

We contend that under the Equity Rule No. 31 the defendants each should have made the affidavits for themselves, and the counsels or solicitors should have made the certificate, and in their failure to do so the Court should have disregarded them.

and therefore the Court erred in refusing to enter judgment for the plaintiffs and against the defendants.

We contend further that counsel for the respective defendants the railroad, could perhaps make the required affidavit, under oath, that said defendants are non-residents of the State of Oklahoma, and make a showing as by law required therein, in said affidavit to that effect, in order to come at least within the rule of law, is a long established common law practice and equity rule.

It has been held that a demurrer should be overruled for failure to be supported by the affidavit of the defendant and upon certificate of counsel. *Secor v. Singleton*, 9 Fed. 809.

That such a defect cannot be waived. *Dupree vs. Leggett*, 124 Fed. 700.

Assignment No. 2.

A.

The Court erred in holding that the Oklahoma statute does not operate and deprive those of Afri-

can descent, of the equal protection of the laws within the meaning of the Constitution.

The "Equal protection of the laws" implies not merely equal accessibility to the Court for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.

That the Police power cannot be interposed to support a statute which have no possible tendency to protect the community or for the preservation of the public safety, but which having no substantial relation to the public welfare, arbitrarily deprive the owner of liberty or property.

Mugler vs. Kansas, 123 U. S. 623, 661, 669.
Lawton vs. Steele, 152 U. S. 133.
Holden vs. Hardy, 169 U. S. 366 398.
California Reduction Co. vs. Sanitary Reduction Works, 199 U. S. 306.
In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.
Freund Police Power, 525.

It has been further held by the courts; that a police regulation passed by the state in the interest of public health, morals and safety, "amount to a denial to persons within its jurisdiction of the equal

protection of the laws, they must be deemed unconstitutional and void."

B.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540.

Police legislation (if this statute can be so considered) on the part of the state may be invalid because it trenches on the sphere of the National Government under the Federal Constitution. Laws which, enacted under plea of Police Power, are in fact a regulation of interstate commerce, are void.

Police legislation which purports to deal with subjects beyond Territorial jurisdiction is opposed to the conception of due process of law and void.

Morgan's Steamship Co. vs. La., 118 U. S. 455-464. *Schollenberger vs. Penn*, 171 U. S. 1. *Missouri, etc., Railway Co. vs. Haber*, 169 U. S. 618. *Reid vs. Colorado*, 187 U. S. 137. *New York, etc., R. Co., vs. New York*, 165 U. S. 628. *Allgeyer vs. La.* 165 U. S. 578.

That a law not enacted in good faith for the promotion of the public good but passed from the sinister motive of annoying or oppressing a particular

person or class is invalid as offending the fundamental principle of the generality of the law, is upheld in *Yick Wo. vs. Hopkins*, cited.

Assignments II. to VII.

That the Oklahoma Act is Violative of the Commerce Clause of the Constitution.

The Court has decided that constitutional provision vesting in the Congress of the United States the power "to regulate commerce with foreign nations and among the several states," (Commonwealth) "and with the Indian Tribes," is an inhibition upon the commonwealths in the behalf of individuals, and renders any attempt of the Commonwealths to restrict the ingress and engress of persons, or in any manner to regulate the same, null and void.

Henderson, et al. vs Mayor N. Y., et al, 92 U. S. R. 259. *Welton vs. Mo.*, 91st U. S. R. 275. *Wabash & C. Ry. Co. vs. I'll.*, 118 U. S. R. 557.

Section 1, of the Separate Coach Law, reads as follows:

"That every Railway Company, Urban or Suburban Car Co., Street Car, Interurban Car, or Railway Co., lessee, manager or receiver thereof, doing business in this state as a common carrier of passengers for hire shall provide separate coaches or compartments as hereinafter provided, for the accomodation of white, and negro races, which separate coaches or cars shall equal in all points of comfort and convenience."

Section 4 of said act further provides:

"Each compartment of a railway coach divided by good and substantial wooden pertition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart," etc.

Section 6 of said act further provides:

"If any passenger upon a railway train, street car, etc., provided with separate coaches or compartments as above provided shall ride in any such coach or compartment not designated for his race, after having been forbidden to do so by the conductor in charge of the train, or car, or shall remain in any waiting room not set apart for the race to which he belongs, he shall be guilty of misdemeanor and upon conviction shall be fined not less than five nor more than twenty-five dollars."

That this act, the separate coach law of Oklaho-

ma, restricts the ingress or egress of passengers by its express terms, in the transportation by any rialroad doing busines in the state of Oklahoma, to interstate to the same extent as intrastate, commerce to passengers who are brought into, to those who are carried out of, and to those who are carried thru, the state to the same extent as to those who are transported only within its borders and it is a penal statute which subjects the former as well as the latter, to fines for its violation.

The Oklahoma act in question is so plain and unambiguous as to have no room for interpretation, and as a well settled rule the unambiguous statutes must be interpreted judicially. Courts have held even if a conflicting contemporaneous construction could enter into consideration, it would not be allowed to over ride the positive language of law.

Houghton vs Payne, 194 U. S. 88, 24 U. S. Sup. Ct. Rep. 590.

The rule is therefore established that, theoretically at least, the doctrine of contemporaneous practical construction does not apply to statutes which are explicit and free from any ambiguity.

Cit. Con:

Swift, etc., Co. vs. U. S., 105 U. S. 695. *U. S. vs. Graham*, 110 U. S. 219, 3 U. S. Sup. Ct. Rep. 582. *Merrit vs. Cameron*, 137 U. S. 542, affirming 102 Fed. Rep. 947. *Franklin Sugar Refining Co. vs. U. S.*, 153 Fed. Rep. 653.

Section 3: "The term negro as used herein includes every person of African descent as defined by the Constitution."

The term negro is defined in section 3 for the purpose of distinguishing him from white passengers as applicable to the law in question, and makes it mandatory upon "every person of African descent" passenger upon a railway train, doing business in this state to ride in the coach or compartment designated for his race, and in violation thereof he shall be guilty of misdemeanor. This law imposes and seeks to, and does regulate all traffic and intercourse and makes no distinction, exemption, or differences between interstate ond intrastate passengers, or to those who are carried thru the state to the same extent as to those who are transported only within its borders and is not confined in its operation and effect to the territorial limits over which the law makers have general and legitimate power. Said defendants have been and are now enforcing this law re-

gardless as to whether the passengers are interstate or intrastate or to those who are carried thru the state to the same extent as those who are only transported within its borders.

That passengers, coming into this state, and those going out, and those going thru the state, upon their failure to go to the coach or compartment designated for the race to which they belong as set forth in this act, have been ejected, arrester and confined in the common jails within the state of Oklahoma upon their refusal to comply with said law.

Commerce among the commonwealths is traffic, transportation and intercourse between two points situated in different states. (Commonwealth).

Wabash St. and P. R. R. Co. vs. I'll., 118 U. S. R. 557.

It is held:

> "When the Supreme Court of a state has construed or has clearly indicated by its decisions that it will interpret a statute of a state that by general terms embraces subjects within and without the constitutional power of the state to be limited in its meaning and effect to the former, that construction necessarily prevails in all the Courts of the state and practically amends the statute and restricts its practical operation and effort to subjects within the

constitutional power of the state. As no rights of citizens of the United States under its constitution are, or can be, injuriously affected by a statute thus limited, the Supreme Court of the United States (and the United States Circuit Court of Appeals) this court, have held that a state law thus amended by judicial legislation and limited by the highest Court of the state that enacted it may be permitted to stand altho it would have been unconstitutional and void if the Supreme Court of the state that enacted it had interpreted it to embrace subjects without as well as within the constitutional power of the state, or if in the absence of construction by the highest Court of the state it embraced such subjects by its terms under the established canons of interpretations."

That the above quoted is the meaning and the legal effect of the decisions relative to this question as cited by defendants, and the majority in the Court of Appeals, in the cases:

Louisville, etc., Ry. Co. vs. Mississippi, 133 U. S. 587, 592. *Chesapeake & Ohio Ry. Co. vs. Ky.*, 179 U. S. 388, 395. *Butler Bros Shoe Co. vs. United States Rubber Co.*, 84 C. C. A. 167, 185, 156, Fed. 1, 19

In the case cited 133 U. S. 591, the Supreme Court had either expressly interpreted or had indicated that it would interpret, 179 U. S. 395, 156 Fed. 19, the statute in question to be limited in its meaning and

effect to subjects within the constitutional power of the state.

We contend that these cited above have no bearing upon the act in question.

The contention is raised: may not the provision "doing business in this state" be reasonably interpreted to mean business done between points within the state, or passengers carried between points within the state? And cite *Pacific Express Co. vs. Siebert*, 142 U. S. 339, and several other cases of like nature in support thereof. The Court said in the case just cited and a like construction is applied to the others:

> "That there is an essential difference between companies defined by this Act and Railroad Companies or Steam Boat Companies, or other Companies that own their own means of transtportation. The vital distinction is this, railroad companies pay taxes on their rolling stocks and road beds etc., as well as, generally, upon their franchise, and steamboats upon their tangible property. This tax is not necessarily an ad valorem tax at the same rate as is paid on other private property in the state to the individual."

That this and other like decisions cited by the defendants and the court below wholly fail to consider

or to determine, we contend, the question which the statute in hand presents.

The Supreme Court of Oklahoma has not construed restricted, or limited this law, nor has it given any intimation that it will ever do so. If, when this statute comes before that Court for construction, it holds that this law means what it clearly and repeatedly declares, "that every passenger whether interstate or intrastate is subject to its provisions and its fines, the statute is unquestionably violative of the Commerce Clause of the constitution, and void. And in the absence of any constructions by that Court this statute must be equally violative of the constitution if its true interpretation and effect is to subject interstate passengers to its provisions and penalties." We must therefore in consideration of this case, resort to the law and to the established rules of constructions of statutes for an answer to the question whether or not national Courts may by judicial construction amend a statute which in plain terms applies without discrimination to subjects without and subjects within the constitutional power of the state so as to exclude the former and include the latter in order to take the law out from under the ban of the construction. This

question is no longer a mooted one, as circumstances similar to those under which this statute comes have been repeatedly answered by the United States Supreme Court and the United States Circuit Court of Appeals. In *U. S. vs. Reese*, 92 U. S. 214, 218, 221; 23 L. Ed. 563, Congress had enacted a law which prescribed pnuishment for the unlawful refusal to accept votes from all the voters while its constitutional power was limited to prescribing the penalty for refusing to receive votes "on account of race, color, or previous condition of servitude of the voter" the contention of the Government was that the Act was constitutional as to all refusals to receive votes on account of the race, color, etc., of the voter, and that it could be sustained to this extent and permitted to fail in other cases, because the two classes of cases and the portions of the Act applicable to them were readily separable. But the argument failed.

The Supreme Court said:

> "We are therefore directly called upon to decide whether a penal statute, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construc-

tion so as to make it operate only on that which Congress might rightfully prohibit and punish. For this purpose, we must take these sections of the statutes as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The porposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it pacific, when, as expressed it is a general one."

In *Trade Mark Cases*, 100 U. S. 82, 25 Law Ed. 550, Congress possessed the constitutional authority to protect trade marks in interstate and foreign commerce, and it enacted a statute which by its terms protected trade marks in all commerce. The Court in these cases was urged to restrict this law by construction to trade marks in interstate and foreign commerse and to sustain it. But the Court cited and quoted from the opinion in the Reese case, and held the act unconstitutional.

We further call the Court's attention to the Virginia Coupon Cases (*Pondexter v. Greenhow*, 114

U. S. 270, 5 Sup. Ct., 903, 962; 29 Law Ed. 185; the same contention was made and again overthrown by the Court with this declaration which was subsequently quoted and affirmed in Income Tax Cases (*Pollock v. Farmers Loan & Trust Co.*), 158 U. S. 636, 15 Sup. Ct., at page 920 (39 L. Ed. 1108.)

> "It is undoubtedly true there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are distinctly separable that each can stand alone, and where the Court is able to see and declare that the intention of the Legislature was that the part pronounced valid should be enforceable even tho the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enforce."

Where a statute contains provisions which are objectionable, and unconstitutional, the whole statute is void unless the Court is able to determine whether the good and bad part of the statute is capable of being separated within the meaning of the rule, but if they are mutually connected and depend upon each other as conditions, considerations or compensations for each other as to warrant the belief that the Legislature intended as a whole, and if all could not be carried into effect the Legisla-

ture would not pass the residue independently. Then if some parts are unconstitutional all the provisions thus dependent, conditional, or connected, must fall with them.

Cooley's Constitutional Limitation, at page 209. *State vs. Denny*, 21 N. E. Rep. 275. *State v. Comm. Perry Co.*, 5, 497. *Island vs. La.*, 103 U. S. R. 80.

See also 61 Fed. 449; 158 U. S. R. 601. 61 Fed. 470.

The legislature of Georgia enacted a statute which would have been valid if it had not contained certain unconstitutional exceptions.

In *Spraigue vs. Thompson*, 118 U. S. 90.94; 6 Sup. Ct. 988, 30 L. Ed. 115 the Supreme Court of that state sustained it upon the ground that the body of the act was readily separable from the exception. The Supreme Court of the United States reversed the decision and said:

> "It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read, may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with

> the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and be beyond what any one can say it would have enacted in view of the illegality of the exception."

The same contention was made in the case of *Chicago, Milwaukee and St. Paul Ry. Co. vs. Westby* 102 C. C. A. 65, 78; 178 Fed. 619, 632, similar in all points as those involved in the case at bar, and after a review of the foregoing authorities and many others not herein cited, the Court held that "A statute of a state which includes by general language in a single class those within and those without, the constitutional class, may be limited by judicial construction to the latter class and then sustianed."

It is admitted that a statute may be unconstitutional in part and valid as to other parts, but we contend that the statute in question is unconstitutional, that a statute void in part is void as a whole unless it is manifest that the portion that is constitutional and the unconstitutional part are

capable of separation so that each may be read and may stand by itself. *Baldwin vs. Franks,* 120 U. S. 697, 685, 686; 7 Sup. Ct., 656, 30 L. Ed. 766. See also *Noel vs. People,* 58 N. E. 616. *Redell vs. Moores,* 88 N. W. 243, reported also in the 55 L. R. A. 740, and the constitutional (if it is constitutional) and unconstitutional parts of this statute are wholly dependant and are so consolidated in its terms which are made applicable to "every passenger" and "every railroad company" (doing business in this state) without distinction between interstate and intrastate passengers, and passengers who are carried thru said state, that such a separation is impossible; (Quoting)—that the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and give effect to the former only. *Cella Commission Co. v. Bohlinger,* 78 C. C. A. 467, 471; 147 Fed. 419, 423, 8 L. R. A. (N. S..) 537; *Ballard v. Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 South, 554, 555; 62 L. R. A. 407, 95 Am. St. Rep. 476; *Allen v. Louisiana,* 103 U. S. 80, 84; 26 L. Ed. 318; *United States v. Reese,* 92 U. S. 214, 218, 221; 23 L. Ed. 563. *The Trade Mark Cases* 100 U. S. 82, 99; 25 L. Ed. 550; *United States v. Har-*

ris 106 U.S.629-641-42; 1 Sup. Ct. 601, 27 L. Ed. 290; *Virginia Coupon Cases* (*Pondexter v. Greenhow*), 114 U. S. 270, 305; 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Spriague v. Thompson*, 118 U. S. 90, 94; Sup. Ct. 988; 30 L. Ed. 115; *Income Tax Cases* (*Pollack v. Farmers Loan and Trust Company*), 158 U. S. 601, 636; 15 Sup. Ct. 912; 39 L. Ed. 1108; and the Oklahoma act or statute now in question cannot be so amended by the ommission of words, sentences or terms or in any othey way than by insertion thereof. We contend that the law makers of the Legislature of the State of Oklahoma in the enacting of the statute in question had but one purpose and object in view and that their intention was to exclude not only colored interstate, intrastate and those going thru the state, but "any passenger" of African descent, from the coaches and cars occupied by white persons. That our contention is sustained not only by the act itself and the reason of the case, but by the fixed established rules for the interpretation of the statute itself. Its terms are unambiguous and its meaning evident and practical construction cannot be invoked. The language and terms therein expressed are not doubtful for the

reason that the intent of the Legislature is plain. It subjects "every passenger" to its provisions and penalties and must be held to mean what it clearly expresses.

United States vs. Ninety Nine Diamonds, 139 Fed, 961, 964, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185; *Burn vs. Mann,* 151 Fed. 145, 157.

We contend that the very fact that the act in question subjects "every passenger" to the provisions of the law (and the law is being enforced) and made no distinction or exception as to interstate pasengers, etc., certainly raises a conclusive legal presumption that they intended to make no such distinction and exception, and therefore is not subject to judicial construction and to so do would in our opinion be what has been termed "unjustifiable judicial legislation." The rule is "that what is not denied is granted."

Hall vs. DeCuir, 95 U. S. 485.

Union Central Life Ins. Co. vs. Champlin, 54 C. C. A. 208, 210; 116 Fed. 858, 860.

Wrightman vs. Boone County 31 C. C. A. 570 572; 88 Fed. 435, 437.

Ma[illegible]en vs. Lanchester Co., 12 C. C. A. 556, 572; 65 Fed. 188, 194.

Omaha Water Co. vs. City of Omaha, 77 C. C. A. 267; 147 Fed. 1; 12 L. R. A. (N. S.) 736.

Cella Commission Co. vs. Bohlinger, 78 C. C. A. 467, 473; 147 Fed. 419, 425; 8 L. R. A. (N. S.) 537.

County of Mobile vs. Kimball, 102 U. S. 691, 697.

Brown vs. Houston, 114 U. S. 622.

Bowman vs. Chicago, etc., Ry. Co., 125 U. S. 465, 488, 499.

That the Court erred in holding the Oklahoma Statute is not in itself discriminatory and does not operate to deprive the Negro race of the equal protection of the law within the meaning of the Constitution.

* * * * * * * * *

We contend that said act of the Oklahoma Legislature approved December 18th, 1907, is unconstitutional for the reason that said Act (1) deprives

all persons of African descent of the equal protection of the law; (2) that it abridges the privileges and immunities; (3) that section seven therein discriminates against those of African descent, and permits the defendants and all of them to exclude and prohibit them from sleeping cars, chair cars and dining cars and that said act makes no provision for the equal facilities for members of African descent whether interstate, intrastate or for those going thru the state. That the statute in question expressly authorizes and requires every railroad doing business in this state, by its arbitrary will, to mark all its chair cars, sleeping cars, dining cars attached to their trains for white persons exclusively and to provide none for those of African descent, or vice-versa. That the act in question is distributive in its interpretation, its construction and in the operation and is formed and applied and is so construed so as to discriminate against one class of citizens as against the other. That said act is being construed, applied, enforced as against those of African descent as a race and in favor of the white race, and deprives those of African descent of the equal protection of the law, in that prior to the passage of this act and

section referred to, those of African descent had the right unrestricted to ride in chair cars, dining cars and the sleeping cars as operated by the railroad companies doing business in this state, and that right was protected by the law which gave damages for its infringement. By Legislative enactment that protection is withdrawn, no damages can accrue for any infringement of our civil rights, while upon the other hand those of African descent are subjected to a penal statute for every attempt to exercise it, and is not consistent with pre-existing rights. A statute so formed and applied that its application and operation can be used to discriminate against one class of citizens is in violation of the law of the United States and is therefore void.

Yick Wo v. Hopkins 118 U. S. R. 356; Chy Lung v. Freeman et al 92 U. S. R. 275; Ex Parte Virginia 100 U. S. R. 339; Kaelar v. Delaware 103 U. S. R. 374; Scott v. Sandford 13 U. S. R. 703.

(2) That this statute, section 7 thereof, delegates the exclusive right to "every railway company doing business in this state" to haul or attach chair cars, dining cars and sleeping cars to its trains for the white race or for those of African descent, but not jointly; that this law does abridge the priv-

ileges and immunities held by those of African descent prior to its passage. The proviso is an attempted evasion as against prior existing rights and is a law without a remedy as against the prior existing rights. It delegates to the railroad companies and their agents, in the application of said law, to discriminate against those of African descent and authorizes the defendants to deny to those of African descent and citizens of the Commonwealth, equal facilities, comforts and conveniences to those which thew give the white (Indian) citizens. We contend therefore that the carriers operate under this law unevenly and oppressive to those of African descent, and in carrying out the intent of the Legislature in the execution of its provisions (as to interstate, intrastate as well as those within the territorial limit of the law makers) which fact cannot be denied that the act is being enforced regardless of the status of a citizen as applies to the terms in parentheses. It is contended by the majority in the Court below that sleeping cars, chair cars, etc., are simply luxuries and that no such provisions are made concerning them as are made concerning the *common* and *indespensible coach* or compartment. The proviso imposes no obligation upon

carriers to haul such cars for either race, etc. But that they are hauling chair cars, etc., and to the exclusion of those of African descent, cannot be denied. The constitutional rights of citizens to their privileges and immunities and to the equal protection of the laws are not dependent upon such considerations nor upon the varying conditions and circumstances which may surround them as above stated and contended. That those of African descent have no adequate remedy at law in that said act provides no penalty for the failure or the refusal to provide equal accomodations, or chair cars, dining cars and sleeping cars and that said law is unconstitutional and void.

Assignments Nos. 10 to 12.

A Provision of the Enabling Act Violated.

It appears on the face of the bill of complainants that the act of the Legislature of Oklahoma approved December 18, 1907, and known as the Separate Coach Law, is in conflict with section twenty-five of the Act of Congress approved June 6, 1906, commonly known as the Enabling Act, and under

which act the State of Oklahoma was admitted into the Union. Said section of said Enabling Act provides, among other things, as follows:

> "The said convention shall and is hereby authorized to form a constitution and state government for said proposed state. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the Declaration of Independence."

Again, section 22. Acceptance of this (the Enabling Act):

> "That the Constitutional Convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

1. Make no Distinction..

The Constitutional Convention had, and could exercise, plenary power except for such limitations and restrictions as are contained in the provisions of the Enabling Act quoted next above.

It has been, and is, conceded that the Act in question upon which the appellees claim the right that appellants are now complaining of, to separate negro and white passengers in their respective roads, is a distinction made on account of race and color

and on that account only; that its operation is for the express purpose of separating negro passengers from white passengers and all other passengers otherwise similarly situated, and for the sole and only reason that the negro is a negro and of African descent.

(2). Race Distinction Defined.

Race dinstinction in the law is any requirement by statute, constitutional, provisional or judicial legislation, that a person act differently if he is a member of one or another of the races in the United States. For example:—If the child of a Japanese is required to attend one school because he is Japanese, a Negro child required to attend another and different school because he is a Negro, and the white child another and different school because he is a white child, and so on through all the various races known to mankind, there would be a well defined and clear cut distinction based wholly upon races. That Congress intended that there should be only one exception to the foregoing provision of the Enabling Act just above quoted is made clear, positive

and conclusive in another part of the Act which provides, among other things:

> "That the people of Oklahoma may establish and maintain separate schools for the white and colored children;"

and that in making this one distinction, after having prohibited all distinctions, it, Congress, evidently intended that no other distinction should be made. Can the Legislature, the creature of the Constitutional Convention, the Supreme Legislative power of the State, do that which the Constitutional Convention itself was prohibited from doing? Can the Legislature make distinction on the account, and that only, of race and color?

Can the state of Oklahoma, after having accepted irrevocably the terms and all of the terms of the Enabling Act, thereafter be heard to complain, and complaining, repudiate any or all of such terms?

(3). Enabling Act Accepted.

In (72) *U. S. Blue Jacket vs. Johnson County Comimssioners,* the Supreme Court of the United States said:

> "A state when admitted into the Union, is

> bound to respect an exemption from taxation which had been previously granted to tribes of Indians within its borders, because the State of Kansas accepted this status when she accepted the Act admitting her into the Union. ** * The State of Kansas is estopped from denying their title to it—the land—she accepted this status when she accepted the Act admitting her into the Union.

In *Frantz et al. vs. Autry,* Supreme Court of Oklahoma, 91 Pac. (193), in the third paragraph of the syllabus the court said:

> "The Convention has and can exercise plenary powers, subject to the limitations and restrictions that the Constitution shall be republican in form, and that it shall be be repugnant to the Constitution of the United States, and the principles of the Declaration of Independence, that no distinction shall be made on account of race or color, and that the Convention shall by ordinance irrevocable accept all the terms and conditions in the Enabling Act."

Assignment No. 12.

Said Act Conflicts with the Fourteenth Amendment to the Constitution of the United States.

Section 3, of the Separate Coach Law of Oklahoma, provides:

> "The term Negro as used herein, includes *every person* of African descent, as defined by

the Constitution—meaning the Constitution of the State of Oklahoma."

Article 23, section 11, Constitution of the State of Oklahoma—Definition of Races:

> "Wherever, in this Constitution, and Laws of this state the word or words Colored or Colored Race, Negro or Negro Race, are used, the same shall be construed to mean or apply to *all* persons of African descent, the term white shall include all other persons."

The Fourteenth Amendment to the Constitution of the United States provides, among other things:

> "That no state shall make or enforce any law which shall abridge the privileges or the immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

Assuming that the Legislature has power to pass a law requiring under penalty that railroad companies provide separate cars for two races and forbid the riding of persons of one race in a car set apart for persons of the other race, under the 14th Amendment, yet such separation must be equal in all points of comfort and convenience *in fact*. Again, let us assume that the Legislature has the right to pass said Law for the safety, comfort and

for the same reason, and absolutely no occasion for sleeping in the same room in the sense that one is in the immediate presence of the other. The express purpose of the passage of the 14th Amendment was to meet just such conditions as we have here. For the language of the Court in *Strauder vs. West Virginia*, 100 U. S. 303, 306 is this:

> "This is one of a series of Constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed." * * * "They especially needed protection against unfriendly action in the states where they were residents." * * * "It was designated to secure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons and to give to that race the protection of the general government, in that enjoyment whenever it should be denied by the states."

Was the law involved in this case passed for the safety, health and comfort of its citizens? This Court will observe that by the definition herein above set out every person and all persons, not of African descent, are white. The Indian, the ward of this Nation, who is far more vicious as well as uncleanly and unhealthy, is thereby made a member of the white race and entitled to enjoy as a white

man, for a white man he is under the definition of races herein; the Italian; fresh from the slums of Italy, who cannot speak our language nor understand our customs, manners, habits or life, is a white man and entitled to all the privileges as is a white man. The Mexican, whose name is not yet on the rolls of progress, education, hygiene, health and safety, is a white man and is entitled to every privilege of the white man under and by virtue of this Act; in fact and in brief, everybody, whatever his station, his education or lack of education, his refinement of lack of refinement, his culture or his lack of culture, his cleanliness or lack of cleanliness, anybody and everybody except members of African descent, is a white man and as such is entitled to and does enjoy every privilege of the white man

A fair consideration of the statements herein will lead to the inevitable conclusion that the law herein complained of was not passed for the health, safety and comfort of its citizens, but is a subterfuge under the guise of police power and police protection and is discriminatory and subject to review by this court to inquire whether the danger justifies the degree of restraint imposed and whether

the Act is not wholly racial and based upon race and color as such.

In the light of and by reason of the foregoing, appellants herein cannot escape the conclusion and do not see how this Court can escape the conclusion that a law, an Act that permits and even authorizes and directs the excluding of one class of persons and in this case the negroes, from privileges and immunities enjoyed by everybody else similarly situated, and excluding the negro, and leaving him without remedy, from the comforts and conveniences of chair cars, dining cars, sleeping cars, such as are enjoyed by all other men; an Act which deprives the negro of the privileges and comforts which he enjoyed prior to the passage of such act; an act which now imposes a fine upon the negro if he attempts to exercise the rights which he enjoyed before the pasage of such act. We cannot see how this Court is going to escape the conclusion that said act does defeat the purpose, defy the spirit, and violate the express provision of the 14th Amendment and is null and void.

We submit that the judgement of the United States Circuit Court of Appeals, Eighth Circuit, should be in all things reversed and remanded, and plaintiff in error granted the relief sought.

Respectfully submitted,

WILLIAM HARRISON,

EDWIN O. TYLER,

ETHELBERT T. BARBOUR,

Counsel for Appellants in Error.

February 21, 1914.

19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [illegible] 1914

NO. [illegible] 15

E. P. McCABE, et al

vs.

The A. T. & S. F. Ry. Co. et al

THE OKLAHOMA SEPARATE COACH LAW CASE

APPEAL FROM C. C. A., EIGHTH CIRCUIT.

BRIEF OF CHAS. WEST,

Attorney General of Oklahoma
of counsel for Defendant

CHAS. WEST, Attorney General.

INDEX

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1913

NO. 111

E. P. McCABE, et al

vs.

The A. T. & S. F. Ry. Co. et al

THE OKLAHOMA SEPARATE COACH LAW CASE

APPEAL FROM C. C. A., EIGHTH CIRCUIT.

BRIEF OF CHAS. WEST,

Attorney General of Oklahoma
of counsel for Defendant

PROPOSITION.

This complaint is of racial separation in passenger travel It is racial, not personal. It seeks

social recognition, not justiciable rights. It does not claim unreasonable discrimination. Yet what the habits, uses, quantities, quality and expenditures of White travel justify and get, by way of passengers' luxuries, this other race demands shall be enjoyed along with them or not at all, at the same time confessing that the density and expenditures of the travel of the blacks cannot demand the like in their own right.

It is the old story of the lure of the fruit,—sweet because forbidden. Not warned by the already apparent evils of white and black inter-association, they seek to make compulsory what Nature, speaking through racial antipathy, abhors. The monopolistic conditions of present day passenger traffic would make racial commingling compulsory if segregation in public places is forbidden.

What the plaintiffs need is not a decree of court, but a sense of Gargantuan humor.

PURPOSE OF CASE IS TO PREVENT SEPARATION OF RACES.

The sole purpose of this litigation was to prevent any separation of the white and black races in the operation of defendants' trains and depots:

To prevent any **'distinction'** being made between them.

While a vague claim was made that plaintiff would not (in the future) get equal service, because this was asserted to be too costly. This lack of future service was not alleged as a denial of a right as such, but only as an instance of the unwelcome distinction against which plaintiffs aim their case.

It was admitted that the law inveighed against required equal service with, however, a separation or distinction. It was asserted that this distinction by law was illegal, and that acts done under it were injurious.

The sole relief sought was not that the law be complied with, but that all defendants' operations under it be forbidden.

PETITION AIMED AT SEPARATION.

Let us get on firm ground as to this:

The characteristic matters stated in the amended bill (record pp 6 to 9) were these:

(Par. second, p. 7 record) That it was the duty of defendants as common carriers under the commerce clause of the federal constitution to transport for pay "all persons, irrespective of their race or color and without any distinction." That the Act of Oklahoma approved December 18, 1907, is in violation of said constitution.

(Par. third, p. 7 record) That the Enabling Act (34 Stat. 267) provided that the constitution should "make no distinction in civil or political rights on account of race or color."

(Par. fifth, pp 7 and 8) That the Oklahoma Act of December 18, 1907, providing that every railway company shall provide separate coaches or compartments as hereinafter provided for the accommodation of the White and Negro races, which separate coaches and cars shall be equal in all points of comfort and convenience, makes a distinction between persons of the White race and persons of African descent. And likewise as to separate waiting rooms.

(Par. sixth, p. 8 record) That notwithstanding the Enabling Act defendants are making distinction in the civil rights of the plaintiffs in the operation of their trains in that equal comforts, conveniences and accommodations will not be provided for the Negroes; the passenger coaches are not constructed and maintained so as to enable Negroes to be provided with separate and equal toilet and waiting rooms for male and female Negro passengers, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars and dining cars.

That the defendants cannot furnish equal accommodations to plaintiffs, except at such ruinous cost as to amount to a confiscation of property.

PRAYER ONLY OBJECTS TO DISTINCTION.

The prayer (p. 9 record) was that defendants be restrained from operating trains and waiting rooms in the manner provided by the Act of the Legislature set out, or in any manner making distinction in the civil rights of Negroes.

PROCEEDING CANNOT BE ONE FOR MANDATORY INJUNCTION FOR EQUAL FACILITIES.

The petition cannot be viewed as one for mandatory injunction to obtain the equal comforts the state statute enjoins, because (first) a plaintiff cannot assert the invalidity of a law as ground for relief under it. Giles vs. Harris, 189 U. S. 475. Here as there the contention is, the whole state scheme is unconstitutional.

Nor (second) because the prayer so definitely prays injunction against any operation under the state statute.

And (third) finally, because the Circuit Court in 1908, when the bill was filed, was without original jurisdiction in mandamus, except under some special statute. Risenbaum v. Bower, 120 U. S. 450; U. S. ex rel v. L. S. & M. S. Ry 197 U. S. 510; Covington Co. v. Hager 203 U. S. 109.

The only special statute approaching the complaint is applicable solely to shipments of freight under terms and conditions as favorable to one shipper as another, 25 Stat. 862, as follows:

> "Sec. 10. That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereto, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms and conditions favorable as those given by said common carrier for like traffic under similar conditions to any other shipper to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars and other facilities for transportation for the party applying for the writ * * * * * * * * *."
>
> Act approved March 2nd, 1899.

The gist of the proceeding under this statute is unjust discrimination in favor of one shipper over another similarly situated. U. S. v. Norfolk Ry. Co. 109 Fed. 831.

All other remedies for violations of the interstate commerce law by way of mandamus (I do not

include the action for damages under section 9) must be under section 16 of the Interstate Commerce Act of February 4, 1887, (24 Stat. 377) as amended June 29, 1906, by applying to and obtaining an order of the Interstate Commerce Commission, then applying to the Circuit Court for a hearing, determination and enforcement thereof.

This petition wholly fails to allege such order of the Commission.

I find no statute, and so assert there is none, giving resort to the Circuit Court for mandamus to transport passengers without first applying to the Interstate Commerce Commission.

ACTION IS NOT FOR DAMAGES.

Plainly this is not an action in damages under section 9 of this Act; the very form of the petition bars such a view.

Application to the Commission, then to the Circuit Court was the remedy followed in U. S. v. Baltimore & Ohio R. R. Co. 145 U. S. 263.

ACTION IS SIMPLY TO PREVENT SEPARATION OF RACES.

If then these proceedings are altogether incapable of being construed as an attempt to affirmatively attain statutory or common law rights by manda-

tory injunction, there remains inevitably this view; the proceeding is one to enjoin separation of the races. Now Chiles v. Chesapeake & Ohio Ry. Co. 218 U. S. 71, firmly asserts the right of a railway company, in the absence of statutory authority, to lawfully separate passengers while furnishing them equal accommodations.

Again, a right of regulation existing under the common law, without statute, is not abrogated by the federal constitution, so that a state may not within its sphere, establish the like regulation by statute.

> Penn. R. R. Co. v. Hughes 191, U. S. 477;
> C. M. & St. P. v. Solon 169 U. S. 133.
> **Atl. Coast Line R. R. v. Mazurky, 216 U. S. 122.**

The petition asserting as it does that the State Act is void and that there is no congressional record on the subject, this must put the acts of the defendants (under said act alleged to be void) on the same plane as acts done without statutory authority.

Is there a difference here because in the one case it was found that the accommodations were equal, whereas in this case it is admitted the accommodations are by law required to be equal. But it is asserted that in the future there will be a distinction made, and Negroes will not get the identical service. It is not definitely asserted that the

defendants already have, or ever will definitely refuse to follow the law. It is only asserted that the result will be that Negroes will not obtain—identical comforts, because the defendants cannot furnish them except at ruinous cost. Why is this?

STATUTE REQUIRES EQUAL COMFORTS.

The statute was thus. (Compiled Laws 1910.)

> "Sec. 860. Railway Company * * * * * doing business in this State as a common carrier of passengers for hire shall furnish separate coaches or compartments, as hereinafter provided, for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort or convenience."
>
> 861. Every railroad company * * * shall provide for and maintain separate waiting rooms at all their passenger depots for the accommodation of the White and Negro races, which separate waiting rooms shall be equal in all points of comfort and convenience.
>
> 866 * * * * * Provided that nothing herein contained shall be construed to prevent railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either White or Negro passengers, separately but not jointly."

The case must thus be viewed as one in which the plaintiffs claim that some right given them by

the common law or statutes is about to be denied to their great injury, that such a right involves transportation either (1) interstate or (2) within Oklahoma.

THE COMMON LAW AND INTERSTATE COMMERCE ACT NEITHER GIVE RIGHT OF ACTION ENFORCEABLE ON FEDERAL COURT IN FIRST INSTANCE i. e. BEFORE APPLICATION TO INTERSTATE COMMERCE COMMISSION AS TO INTERSTATE TRAFFIC.

To consider the interstate question first: Have they alleged a common law or statutory right? It has been frequently held that the first sections of the original Interstate Commerce Act were but declaratory of the common law.

> U. S. v. Hanley, 71 Fed. 673;
> Int. Com. Com. v. B. & O. 145 U. S. 263;
> Taft v. So. Ry. Co. 123 Fed. 792.

The Interstate Commerce Act gives no new absolute right of identical transportation, transportation without distinction, it only prohibits undue or unreasonable preferences or advantages and commands like services under substantially similar circumstances and conditions.

The roads if they in practice followed Section 866 of the Oklahoma Act, and provided a separate chair car, dining car and sleeping car for Negroes under the same circumstances as in case of Whites, would not be violating the Commerce Act.

Inter. Com. Com. v. B. & O. 145 U. S. 263;
Inter. Com. Com. v. Ala. Co. 168 U. S 165;
Inter. Com. Com. v. Louisville Co. 73 Fed 409.

Whether as to interstate passenger traffic the rates, cars, services and practices of the defendants were violative of the Commerce Act is not a question of which the Circuit Court had jurisdiction until after the Commission had rendered an order in the premises.

T. & P. v. Abilene Cotton Oil Co. 204 U. S. 426;
B. & O. v. U. S. ex rel Pit Cairn Coal Co. 215 U. S. 481.

Thus the entire question of Interstate Commerce or rights under it, is out of the case.

RIGHT OF ACTION CANNOT ARISE OUT OF STATE LAW FOR WANT OF JURISDICTION IN THE LOWER COURT.

As to the state law the court below has no jurisdiction to enforce any right given by state law

because the petition cannot rest upon diversity of citizenship in the absence of an allegation of damage to the extent of $2000.00 (filed in 1908).

U. S. v. Sayward, 160 U. S. 493.

RIGHT OF ACTION CANNOT ARISE OUT OF THE ENABLING ACT.

The Enabling Act was a direction to the Convention, not a law, giving justiciable rights.

Permoli v. First Municipality 3 How 588.

Oklahoma when admitted was as other states.

Coyle v. Smith 221 U. S. 559.

See also: Ex parte Webb, 225 U. S. 663;

U. S. vs. Sandoval, decided Oct. 20, 1913, in this court.

RIGHT OF ACTION CANNOT ARISE OUT OF THE CONSTITUTION OF THE UNITED STATES

The federal constitution did not guarantee the Negro man chair cars, diners nor sleepers, unless he was traveling ordinarily in such numbers and such wise as to reasonably use and reasonably demand separate accommodations of that character. If his travels be such his remedy is, for interstate transportation, to apply to the Interstate Commerce Commission; for state transportation, to the State Corporation Commission, which under Section 18, Article 9 of the Oklahoma Constitution had power to compel the recognition and supply of his reasonable and lawful demands and uses.

PLAINTIFFS DO NOT ALLEGE LACK OF COMFORTS UNDER CIRCUMSTANCES SUFFICIENT TO COMPEL THEIR FURNISHING.

The plaintiffs do not allege that they are ready, willing, anxious or customarily about to use diners or sleepers in such sufficient quantities as to require their supply. Chair cars in the Western sense (in the West they are not the same thing as in the East and do not mean parlor cars) are in no way superior to the ordinary day coach. The Court will take judicial notice that the best operated roads in the country, the Pennsylvania, Baltimore & Ohio, L. S. & M. S. do not use them.

The whole question is moot.

NO INJURY SHOWN.

A party who in this court seeks to strike down a state statute as violative of the Constitution must show that it injures him.

So. Ry. Co. v. King, 217 U. S. 524.

In this case the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the White traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have

not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility.

As to what public facilities are demanded by state traffic, this is within the power of the State Corporation Commission to determine, as a legislative matter.

St. L. & St. Co. v. Sutton, 29 Okla. 553;
M. O. & G. v. State, 29 Okla. 640, p. 653.

Respectfully submitted,

CHAS. WEST, Attorney General.

l Pullman intrastate service in Oklahoma, see attached
ate Pullman service would be actually used by persons
l by persons of the white race.

---

nission of Oklahoma, hereby certify that the attached
f insert sheet marked, "61-A" of the annual report of
n for the fiscal year ended June 30th, 1913.
ed the seal of said Commission, this the 9th day of

J. E. LOVE,
Chairman Corporation Commission.

TISTICAL STATEMENT

OKLAHOMA

	NUMBER OF PASSENGER MILES				Car Miles	Equipment Ton-Miles
	Intrastate	Interstate	Transstate	Total		
	474,884	3,633,412	4,422,946	8,531,242	997 566	56,428,456
)	1,812,820	3,956,151	1,043,180	6,812,151	1,009,309	57,606,977
	318,829	3.032.317	4,686,406	8,037,552	1,051,026	64 412,609
	338,284	1,204,347	1,410,678	2,953,309	352,624	21,682,989
	8,282	39,117	61,200	108,599	59,552	3,747,695
	15,187	410,396	1,332,584	1,758,167	294,182	16,282,647
	571,045	530,469		1,101,514	221,561	10,823,446
	2.159,598	5,686,602	15,663,481	23,509,681	2,369,805	145,468 049
		1,632		1,632	96	5,264
	31,354	344,818	1,367,032	1,743,204	267,388	16,290,585
	3,776,505	7,162,507	5,442,499	16 381,511	2,399,870	139,574,338
	3,546	99,207		102,753	43,955	2,777,749
	9,510,334	26,100,975	35,430,996	71,041,315	9,066,934	535,401,304

tions	Cars Used Strictly in Intrastate Service [Average]
- - -	1 1-2
- -	1
- - -	3 1-6
- -	2
Total, - -	7 2-3

As tending to show the relatively inconsequ
report, and from it form a guess of how much i
of the negro race, if such a small amount only is

I, J. E. Love, Chairman of the Corporation
is a full, true and correct copy in words and figu
the Pullman Company to the Corporation Co mn

In witness whereof, I have set my hand and
January, 1914.

(SEAL.)

Attest; J. H. Hyde, Secretary

OPERATING AND S

STAT

CONTRACT OPERATIONS	NUMBER OF PASSENG		
	Intrastate	Interstate	Transstate
Atchison, Topeka & Santa Fe	12,131	48,113	33,176
Choctaw, Oklahoma & Gulf	20,756	32,060	2,944
Chicago, Rock Island & Pacific	4,979	31,713	50,137
Gulf, Colorado & Santa Fe	6,668	13,768	14,525
Kansas City, Mexico & Orient	124	705	306
Kansas City Southern	446	7,643	11,043
Midland Valley	11,385	6,637	
Missouri, Kansas & Texas	21,098	52,424	65,098
Missouri, Oklahoma & Gulf		102	
St. Louis, Iron Mt. & Southern	755	5,022	8,525
St. Louis & San Francisco	37,245	51,282	32,062
Wichita Falls & Northwestern	79	1,643	
TOTAL	115,666	251,112	217,816

Contract O

Choctaw, Oklahoma & Gulf -

Midland Valley -

Missouri, Kansas & Texas -

St. Louis & San Francisco

No. [redacted] 16

NUMBER 22,698

In the Supreme Court of the United States

October Term, 1914

E. P. McCABE, et al,
Appellants,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al,
Appellees.

BRIEF FOR APPELLEES

S. T. Bledsoe,
Attorney for Appellees.

J. R. Cottingham,
C. G. Blake,
Clifford L. Jackson,
R. A. Kleinschmidt,
C. E. Warren,
Of Counsel for Appellees.

Oklahoma Law Brief Co., 319-20-21 Majestic Bldg., Oklahoma City

Index to Subjects

Index to Cases Cited

NUMBER 22,898

In the Supreme Court of the United States

October Term, 1914

E. P. McCABE, et al,
Appellants,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellees.

BRIEF FOR APPELLEES

STATEMENT.

We cannot agree to the statement of facts found in brief filed by appellants. This statement does not give proper consideration to the controlling factors in the disposition of the cause in the trial court and in the Circuit Cout of Appeals. We therefore prefer to present a concise

but complete statement of these issues from our own standpoint.

On the 15th day of February, 1908, the appellants filed their bill of complaint against the appellees, in the Circuit Court of the United States for the Western District of Oklahoma (Tr. 3-5). The jurisdiction of the Circuit Court of the United States as a court of the United States was invoked solely upon the ground of diversity of citizenship, although there were allegations in the body of the bill charging that the statute challenged was violative of the Oklahoma Enabling Act and the Federal Constitution.

On the 26th day of February, 1908, appellants filed their amended bill of complaint against the appellees (Tr. 6-9) in which they continue to rest the jurisdiction of the court upon diversity of citizenship of the parties litigant (Tr. 6), the allegation being that each of the complainants there, appellants here, is a resident of the Western District of the State of Oklahoma, and that each of the defendants there, appellees here, is a foreign corporation, stating specifically the state under the laws of which each of the appellees was incorporated.

For convenience throughout this brief appellants will be referred to as "plaintiffs," the position they occupied in the trial court, and appellees will be referred to as "defendants," the position they occupied in said court.

The bill charges, in substance, that the plaintiffs are

Negroes, descendants of the African race; that the defendants are common carriers of passengers, state and interstate, within the State of Oklahoma, and that the defendants are about to observe and comply with the provisions of the Oklahoma separate coach law. The gravamen of the complaint is found in the fifth paragraph of the bill, which is as follows:

> "That notwithstanding the terms of said Act of Congress which have been adopted into and become a part of the Constitution of the State of Oklahoma, the legislature of the State of Oklahoma passed an act entitled, 'An act to promote the comfort of passengers on railroads, etc.,' which act was declared an emergency act and was approved on the 18th day of December, 1907, and that the State of Oklahoma is now attempting to put said act in operation. That by said act it is among other things provided 'that every railway company, urban or suburban car company, street car or interurban car or railway company, lessee, manager or receiver thereof, doing business in this State as a common carrier of passengers for hire, shall provide separate coaches or compartments as hereinafter provided for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and conveniences.' That said act further provides that separate waiting rooms and separate conveniences are to be provided for the white and colored races, and prevents any colored person or persons of African descent from having any of the facilities provided for white persons and requires separate facilities to be provided for persons of African descent and makes a distinction between persons of the white race and persons of African descent." (Tr. 7-8.)

Attention is directed to the fact that no complaint is made in this paragraph of the provisions of the law per-

mitting the hauling of sleeping cars, dining or chair cars to be used exclusively by either race.

Paragraph six of the bill charges that the separate coach law violates the Enabling Act in that it discriminates on account of race and color, and that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it abridges privileges and immunities of plaintiffs as citizens of the United States and deprives them of their rights without due process of law. The grounds for equitable relief are found in the following allegations in paragraph six of the bill:

> "And your orators further charge that the acts and conduct of the defendants and each of them are being done under the provision of the State of Oklahoma above set out, and will be continuous and will work great hardships upon your orators and all persons of the negro race desiring to travel on railroads in the State of Oklahoma, and unless restrained and enjoined by your honors from carrying out the intended injury, a multiplicity of suits will ensue, there being at least fifty thousand persons of the negro race in the State of Oklahoma who will be injured and deprived of their civil rights unless so restrained by this honorable court." (Tr. 8-9.)

The relief prayed for is as follows:

> "To the end, therefore, that your orators may have that relief which they can only obtain in a court of equity and that said defendants may answer the premises, they now pray the court that the defendants and each of them be enjoined and restrained from in any manner constructing, maintaining or operating passenger trains and coaches, depots, waiting rooms and all other passenger service in the State of Oklahoma

in the manner provided by the Act of the Legislature above set out, or in any manner making distinctions in the race or color, in the conduct and operating of the passenger service and trains of the said defendants and each of them, and for such other and further relief as may be just and for costs." (Tr. 9.)

It is apparent that the relief sought is an injunction against constructing and maintaining separate and equal facilities as required by the separate coach law of the State of Oklahoma. It will be further observed that the bill contains no allegation of the amount in controversy, nor is there anything in the record from which it may be ascertained that the amount involved exceeds the sum of two thousand dollars, *Thompkins* v. *M. K. & T. Ry. Co.*, 211 Fed. 391.

An injunction was denied and the demurrers of the defendants to the bill sustained and the cause dismissed. From the judgment of dismissal the plaintiffs prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit. A motion was there presented to dismiss the appeal because of the absence from the bill of an averment of the jurisdictional amount (Tr. 37). The motion was denied by the Circuit Court of Appeals and the cause submitted upon the merits, and the judgment of the Circuit Court affirmed. (Tr. 62.) 186 Federal 966.

On the 15th day of July, 1911, an assignment of errors was filed and an appeal allowed to this court by Judge Walter I. Smith, one of the judges of the Circuit Court of

Appeals for the Eighth Circuit. The assignment of errors (Tr. 66) attempts to bring into the cause certain contentions found in the dissenting opinion of Judge Sanborn, but which were not made the basis of any relief prayed for in the bill.

For the convenience of the court the separate coach law of Oklahoma is printed as Appendix "A" to this brief and, inasmuch as the Mississippi separate coach law has been the subject of full consideration, this law is likewise, for the convenience of the court and for comparative purposes, printed as Appendix "B."

POSITION AND CONTENTION OF DEFENDANTS.

The defendants have carried, and must in the future continue to carry, the chief burdens of the separate coach law of the State of Oklahoma. They, however, are common carriers engaged in the transportation of passengers and freight, state and interstate, within the State of Oklahoma. The public sentiment of the state, as evidenced by the separate coach law thereof, demands a separation of the white and negro races by transportation companies. The law not only requires of such transportation companies the maintenance of separate facilities at stations and on trains for the accommodation of the races separately, but imposes upon the carriers the duty of seeing that each of the races are assigned to the facilities provided for such race. Notwithstanding the separate coach law is a burden upon the

defendants, they have consistently, and now insist, upon the validity and constitutionality of said act. They insist that, properly interpreted, the act relates only to intrastate commerce, and is not violative of the Commerce Clause of the Federal Constitution. They insist that the act provides for facilities equal in points of convenience and comfort for both races; that the fact that it does not require identical facilities for both races does not render it violative of the Fourteenth Amendment to the Federal Constitution, nor does the authority to haul sleeping, dining, and chair cars, for either race when business conditions justify and demand it, constitute a discrimination against the race the travel of which would not justify such facilities even if no separate coach law were involved. Defendants have, however, felt that the State of Oklahoma in its sovereign capacity is vitally interested in the legislation here involved. Each time the cause has been submitted they have notified the Attorney General of the State and have asked him to participate in the presentation of the cause.

Upon such notice and invitation the Attorney General has filed a brief in this cause as of counsel for defendants, the purpose of which, however, is to submit the views and contentions of the State of Oklahoma in relation to the law. As such counsel the Attorney General has been invited to participate in the oral argument on behalf of the defendants and to share the time allotted to counsel for defendants under the rules of the court. Counsel for defendants has grave doubt as to the jurisdiction of this court to entertain

the appeal. No motion has been made to dismiss the appeal, nor is there any desire to avoid a disposition of the cause on the merits. It is felt, however, that good faith to the court requires that the court's attention be directed to the question of jurisdiction in order that such question may be considered and disposed of as the court may see fit.

Has this Court jurisdiction to entertain the appeal?

Defendants submit the question of this court's jurisdiction with the suggestion that the bill contains no allegation that the value of the rights involved amounts to the sum of two thousand dollars, or any other sum, nor was the jurisdiction of the trial court invoked upon any other ground than diversity of citizenship. Was not, therefore, the judgment of the Circuit Court of Appeals final?

26 Stat. 828, chapter 517.
Shulthis v. *McDougal*, 225 U. S. 561.
Arbuckle v. *Blackburn*, 191 U. S. 405.
Hanford v. *Davies*, 163 U. S. 274.
Bonin v. *Gulf Co.*, 198 U. S. 115.
Shoshone Mining Co. v. *Rutter*, 177 U. S. 505.
Florida Central Co. v. *Bell*, 176 U. S. 321.

The Oklahoma Separate Coach Law is not violative of Section 8 of Article 1 of the Constitution of the United States.

Section 1 of the Oklahoma separate coach law is as follows:

"Every railway company, urban or suburban car company, street car or interurban car, railway company,

> lessee, manager or receiver thereof, doing business in this state, as a common carrier of passengers for hire, shall provide separate coaches or compartments, as hereinafter provided, for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and convenience."

Rev. Laws of Oklahoma, 1910, Section 860, Appendix A.

If the State of Oklahoma has the right to prescribe separate coaches for interstate passengers, and the language of the act may be fairly construed as applicable to such passengers, then it should be held applicable to interstate passenger transportation. If the State of Oklahoma may not lawfully prescribe separate coaches for interstate passengers, the act should be limited in its application to intrastate passengers, if a reasonable interpretation of the language renders such a solution possible.

The concluding paragraph of Section 34 of Article 9 of the Oklahoma Constitution is as follows:

> "The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

Article 9 of the Oklahoma Constitution deals with the subject of the regulation of transportation and transmission companies doing business in the state. The paragraph quoted is a command to the legislature to enact no legislation which conflicts with the Federal Constitution. The Supreme Court of the State has not been called upon to

determine whether the Oklahoma separate coach law applies to interstate passengers. It has, however, forecasted what its conclusions will be in other cases involving very similar questions from which it is manifest that the law will be held applicable only to intrastate passengers.

Atchison, Topeka & Santa Fe Ry. Co. v. *State* (Okla.), 124 Pac. 56, 33 Okla 158.
Atchison, Topeka & Santa Fe Ry. Co. v. *State* (Okla.), 124 Pac. 57, 33 Okla 105.

The rule is so well established that if a statute is capable of more than one interpretation, one of which will render it invalid and the other valid, that it is the duty of the Court to give that interpretation which will sustain its validity that authorities need not be cited in support thereof. Therefore, if the Oklahoma Separate Coach Law is capable of being interpreted as applicable to both inter and intrastate passengers, or to intrastate passengers only, and that to construe it so as to make it applicable to interstate passengers will destroy its validity, it is the duty of the Court to construe it as applicable to intrastate passengers alone.

The Supreme Court of Louisiana in the case of *ex rel Abbott* v. *Hicks*, 44 La. Annual 74, 11 So. 74, held the Louisiana Separate Coach Law, which is as broad as the Oklahoma Separate Coach Law, applicable to intrastate passengers only.

The Supreme Court of Mississippi in the case of *Louisville, etc., Railway Co.* v. *State*, 6 So. 203, held the Missis-

sippi Separate Coach Law applicable alone to intrastate passengers. The language of the Mississippi statute is as broad as that of the Oklahoma statute.

This Court affirmed the decision of the Supreme Court of Mississippi in the case referred to, and approved the reasoning by which the Mississippi act was limited in its application to intrastate passengers. *Louisville, etc., Ry. Co.* v. *Mississippi*, 133 U. S. 587. The Court of Appeals of Kentucky in the case of *Ohio Valley Ry's., Receivers,* v. *Lander et al.*, 47 S W. R. 344, sustained the validity of the Kentucky Separate Coach Law, and held it applicable to intrastate passengers only. In disposing of the contention that the Kentucky Separate Coach Law was a regulation of interstate commerce, the Kentucky Court of Appeals used the following language:

> "It is insisted for appellee that the act under consideration undertakes to regulate or control as to interstate passengers, and that portion of the statute is invalid, as being in conflict with the interstate commerce clause of the United States Constitution, and that the act is inseparable, and therefore it must all be held invalid. We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision, hereinbefore referred to, of the Supreme Court of the United States in the case of *Louisville, N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, and also in conflict with the well-settled rules of construction. If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the

state, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this state, and railroad companies receiving passengers in this state, are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the state."

This Court in the case of *Pacific Express Company* v. *Seibert,* 142 U. S. 339, interpreting the language "business done within this state," found in Section 2 of the Act of the Legislature of Missouri of May 16, 1889, uses the following language:

"The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its *intrastate* business. We think a proper construction of the statute confines the tax which it creates to the intrastate business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done *within this State* of each agent of such company doing business *in this State,*' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats *within this State* for the transportation of their freight *within this State* may be deducted from the gross receipts of the company on such business;' and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done *within this State,*' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, ex-

pressly limit the tax to receipts for the sums earned and charged for the *business done within the State.* This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the Company. 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, in the case of *Butler Brothers Shoe Company* v. *United States Rubber Company,* 156 Fed. 18, uses the following language:

"There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is today, and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the Legislature of that state intended in the adotion of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intrastate business only, and the exercise by foreign corporations of corporate power unauthorized by the Constitution and laws of the United States, and that only, without a license from their state. Hence, this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict with the Constitution and the laws of the United States. The Supreme Court

seems to have been inclined to a liberal interpretation of this nature, for in *Fritts* v. *Palmer,* 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, the foreign corporation had clearly violated the plain terms of the Colorado statute. It had exercised corporate power in that state. It had acquired, held, and conveyed real estate in violation of the legislation of that state, and yet the court sustained the title. The Supreme Court of Colorado construed this legislation in this rational spirit when it held that a single act of business did not come within the purview of some of these statutes (*Kindel* v. *Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Roseberry* v. *Valley Building & Loan Ass'n.*, 83 Pac. 637), although by their express terms they prohibited a single exercise of corporate power and a single act of business as imperatively as they forbade many. An interpretation of this legislation so that it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just and it is supported by high authority. *Harris* v. *Runnels*, 12 How. 79, 84, 13 L. Ed. 901; *National Bank* v. *Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Coit* v. *Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *Oakland Sugar Mill Co.* v. *Fred W. Wolf Co.*, 118 Fed. 239, 243, 55 C. C. A. 93; *Watrous & Snouffner* v. *Blair*, 32 Iowa 58; *Pagborn* v. *Westlake*, 36 Iowa 546, 548; *Chattanooga R. & R. Co.* v. *Evans*, 66 Fed. 809, 815, 816, 14 C. C. A. 116, 121, 122."

The opinion of the Circuit Court of Appeals in this case is in reason conclusive of the contention that the Oklahoma Statute applies to intrastate passengers only. In reason and under the authorities the Oklahoma Statute should be interpreted as applicable to intrastate passengers only. The bill in fact presents no charge that the statute is applicable to interstate passengers.

The State of Oklahoma, through its Attorney General, is here insisting that the proper interpretation of the statute is to limit it in its application to intrastate passengers. The natural and, it seems to us, the necessary interpretation of the Oklahoma Separate Coach Act is to hold it applicable to intrastate passengers only.

Plaintiffs do not charge that the Oklahoma Separate Coach Law will be applied by the railway companies to interstate passengers or that they or either of them will suffer any damage or wrong because of the application of said Act to interstate passengers.

The bill does not allege that the Railway Companies contemplate applying or will apply the Separate Coach Statute to interstate passengers. Nor does it charge that the plaintiffs have suffered or will suffer any wrong or injury by the defendants' applying the Oklahoma Statute to interstate passengers. They have not alleged such a state of facts as entitles them to the judgment of this Court upon the question as to whether or not such statute is a regulation of interstate commerce. *So. Ry. Co.* v. *King*, 217 U. S. 524; *Thompkins* v. *M. K. & T. Ry Co.*, 211 Fed. 391.

This Court should not pass upon the constitutionality of a State Statute as violative of the Federal Constitution until there is a direct charge of the violation of the plaintiffs' right in that respect. To hold the Oklahoma Separate Coach Law is violative of the Commerce Clause of the Con-

stitution, under the allegations found in the bill, would be a mere matter of speculation. It would be an adjudication of invalidity upon the possibility that a wrong might be perpetrated, but not upon the ground that an injury had been, or would necessarily be suffered.

The constitutionality of Separate Coach Law not affected by provisions of Enabling Act.

The first paragraph of section 3 of the Enabling Act is as follows:

> "That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory on the second Tuesday after their election, excluding the day of election in case such day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, and, after organization, shall declare, on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

This paragraph is directed to the Constitutional Convention and Constitution makers. The question of whether or not it had been complied with was submitted to the President of the United States in accordance with the provisions of the Enabling Act, and he had to determine the same in the affirmative before he could issue his proclamation

admitting Oklahoma to statehood. After the issuance of that proclamation the provision referred to had served the purpose for which it was inserted in the Enabling Act. It is not addressed to the subsequent legislative bodies of the State of Oklahoma, nor to the people of the State of Oklahoma. It would be strange indeed to give this provision of the Enabling Act a construction not in keeping with the language thereof, and the result of which would be to deprive the sovereign State of Oklahoma of the exercise of the police control in its local affairs that is enjoyed by all of the other states of the Union, when by the specific terms of the Enabling Act it is admitted upon an equal footing with the other states of the Union. It is respectfully submitted that there is nothing whatever in the contention that the Enabling Act prohibited the legislature from making a distinction on account of race or color, or that the separate coach law of Oklahoma does make a distinction on account of race or color. *Permoli* v. *First Municipality*, 3 How. 589, 609; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Ward* v. *Race Horse*, 163 U. S. 504; *Bolln* v. *Nebraska*, 176 U. S. 83.

The Separate Coach Law of Oklahoma does not conflict with the Fourteenth Amendment to the Constitution of the United States.

The authority of a State to require a separation of the races traveling by common carrier between stations within

its border is authoritatively settled by an unbroken line of decisions of this court.

Louisville, New Orleans & Texas Ry. Co. v. *Miss.*, 133 U. S. 587.
Plessy v. *Ferguson*, 163 U. S. 537.
Chesapeake & Ohio Ry. Co. v. *Kentucky*, 179 U. S. 388.

And likewise the right of the carrier to prescribe reasonable rules and regulations for a division of the races has been sustained by this court. *Chiles* v. *Chesepeake & Ohio Ry. Co.*, 218 U. S. 71; and by other courts, *Thompkins* v. *Missouri, Kansas & Texas Ry. Co.* 211 Fed. 391.

Apparently, the general theory of the plaintiffs is that they are protected and guaranteed equal social rights by the Enabling Act, if not by the Fourteenth Amendment to the Constitution of the United States; that the Oklahoma separate coach law is a violation of such social rights; and that for that reason, if for no other, they are entitled to have the observance of the law by the defendants enjoined.

The matter of the separation of the races in public places and especially in transportation facilities is vital to the people of the southern states. It is a practical condition with them and not a theoretical question. It is a situation that can be dealt with only from a practical standpoint. It is a situation that this court has said the several states have a right to deal with by law prescribing reasonable regulations. The authority to enact generally a separate coach

law has been sustained by this court both upon principle and authority. In the case of *Plessy* v. *Ferguson*, 163 U. S. 537, *supra*, this court, discussing the principles involved, uses the following language:

> (p. 551) "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature and should enact a law in precisely similar terms, it would thereby regulate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudicies may be overcome by legislation, and that equal rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 348, 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil

and political rights of both races be equal one can not be inferior to the other, civilly or politically. If one race be inferior to the other socially, the Constitution of the United States can not put them upon the same plane."

The statute, in addition to the ordinary separate coach law provisions, contains a further provision that authorizes the carriers to haul Pullman cars, dining cars, and chair cars for either race. There is no charge made in the bill of complaint that there is any discrimination against persons of African descent arising out of the authority granted to the railway companies under this section of the act. The members of the legislature of the State of Oklahoma were undoubtedly familiar with the character and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel in the State of Oklahoma. *Corporation Commission of Oklahoma* v. *A. T. & S. F. Ry. Co.*, 25 I. C. C. Rep. 120. This practical experience was no doubt gathered from their travel on trains of the several carriers in the State of Oklahoma. This view of the matter is borne out by the fact that there is no allegation in the bill charging any discrimination on account of the hauling by the carriers of Pullman cars, dining cars and chair cars for the members of either race. Perhaps so far as the chair cars are concerned no assumption of discrimination should arise from the permission to haul these for either

race. There is no allegation that the coaches are not equal in point of comfort and convenience to the chair cars. In fact a Pullman car, in so far as day travel is concerned, affords no greater comfort or convenience for day travel than do the coaches in use in Oklahoma.

It is a public fact, of which this court might well take knowledge, that the day coaches in use on the main lines of the railway companies in the State of Oklahoma, where Pullman cars are hauled, are first class in every particular and equal in pointt of comfort and convenience to any coach or car of any character hauled on any train in the state. They are altogether superior to the day coach used on the average eastern line.

Of the railway lines involved, two haul dining cars and four Pullman cars, which, so far as intrastate traffic is concerned, are hauled for the accommodation of the white race. One of the defendants hauls neither Pullman cars nor dining cars. These facts are not shown in the record, but the defendants prefer a judgment upon the facts as they exist. In order that this may be done, defendants further state (although these facts are not contained in the record) that immediately following the enactment of the separate coach law in Oklahoma, which was made effective upon the date of its approval by the Governor, there was some complaint as to the adequacy of the facilities by both races and an emergency existed which could not be instantly met. This condition, however, was remedied as rapidly as

possible and to the satisfaction of the great majority of the persons of African descent in the state.

It is respectfully submitted that the main contention in relation to the matter of discrimination and, in so far as it relates to Pullman and dining cars, had its origin in the dissenting opinion of Circuit Judge Sanborn in this cause. Practically, persons of African descent had found no reason to complain of the Pullman car and dining car service for the white race. In Judge Sanborn's dissenting opinion they found a theoretical basis for such complaint. This is said without any disrespect to Judge Sanborn or his opinion in this cause. For him personally, and for his ability as a jurist, we have the greatest admiration. From his environment he has come in contact only with the theoretical side of this extremely practical question. However, for Judge Sanborn's present views see *Thompkins* v. *Missouri, Kansas & Texas Ry. Co.*, 211 Fed. 391.

As to divisibility of Statute

Appellees agree with appellants that the statute must stand or fall as a whole; that the legislature of Oklahoma would never have enacted a law requiring the hauling of separate Pullman cars and separate dining cars for the white and colored races each. Such a requirement would have rendered intrastate passenger transportation so expensive as to constitute an extreme burden upon both the railways and the people of the state. Neither would the legislature have provided for separate facilities as to the chair cars and day coaches and required the joint use of sleeping cars by both races. We, therefore, agree that,

if any part of the statute is invalid, the entire statute must fall; but we respectfully insist that the statute as a whole is valid; that the bill of complaint in this case neither makes claim nor proceeds upon the basis that substantial inconvenience, wrong or harm will result to persons of African descent from a fair administration of the Oklahoma separate coach law.

The holding of this statute violative of the federal constitution and void would be a matter of gravest concern to the people of the State of Oklahoma. It should not be done upon conjecture as to possible injury or deprivation of theoretical rights.

We respectfully submit that for the reasons above stated, as well as for those found in the opinion of the Circuit Court of Appeals for the Eighth Circuit, *McCabe* v. *Railway Co.*, 186 Fed. 966, the authority given to the railway companies to haul, and their hauling of Pullman cars and dining cars, for the white race only does not violate the constitutional rights of the plaintiffs.

Respectfully submitted,

S. T. Bledsoe,
Attorney for Appellees.

J. R. Cottingham,
C. O. Blake,
Clifford L. Jackson,
R. A. Kleinschmidt,
C. E. Warner,
Of Counsel for Appellees.

APPENDIX A

COACH LAW

SEPARATE COACHES—WAITING ROOMS.

ARTICLE I.

AN ACT to promote the comfort of passengers on railroads, street cars, urban, suburban, interurban cars and at railway stations, requiring all railway companies, street cars, urban, suburban, interurban car companies, carrying passengers on their trains or cars within this State, to provide equal but separate coaches or compartments, and separate waiting rooms at stations or depots, so as to secure separate accommodations; defining the duties of officers of such railway, street car, urban, suburban, or interurban car company; directing them to assign passenger to coaches or compartments set aside for the use of the race to which said passenger belongs; authorizing them to refuse to carry on their trains or cars such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned, to exonerate such railway, street car, urban, suburban or interurban car company from any of the blame or damage that may proceed or result from such refusal; to provide penalties for the violation of this act, and declaring an emergency.

Be it Enacted by the People of the State of Oklahoma:

Section 1. That every railway company, urban, or suburban car company, street car or interurban car railway company, lessee, manager or receiver thereof, doing business in this State, as a common carrier of passengers for hire shall provide *separate coaches* or compartments, as hereinafter provided, for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and convenience.

Section 2. Every railroad company, street car com-

pany, urban, suburban, or interurban car company, shall provide for and maintain separate waiting rooms at all their passenger depots for the accommodation of the white and negro races, which separate waiting rooms shall be equal in all points of comfort and convenience. Each waiting room shall bear in conspicuous place words in plain letters indicating the race for which it is set apart. It shall be unlawful for any person to use, occupy or remain in any waiting room, toilet room, or at any water tank in any passenger depot in this State, set apart to a race to which he does not belong.

Section 3. The term negro as used herein, includes every person of African descent, as defined by the Constitution.

Section 4. Each compartment of a railway coach divided by good and substantial wooden partition, with a door therein shall be deemed a separate coach within the meaning of this Act, and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart; and each compartment of an urban or suburban car company, interurban car or railway company, or street car company, divided by a board or marker, placed in a conspicuous place, bearing appropriate words in plain letters, indicating the race for which it is set apart, shall be sufficient as a separate compartment within the meaning of this Act.

Section 5. Any railway company, street car company, urban or suburban car company, or interurban car or rail-

way company, lessee, manager or receiver thereof, which shall fail to provide its cars, bearing passengers, with separate coaches or compartments as above provided, or fail to provide and maintain separate waiting rooms as provided herein, shall be liable for each and every failure to a penalty of not less than one hundred nor more than one thousand dollars, to be recovered by suit in the name of the State, in any Court of competent jurisdiction, and each trip run with such railway train, street car, urban, suburban or interurban car without such separate coach or compartment shall be deemed a separate offense.

Section 6. If any passenger upon a railway train, street car, urban, suburban or interurban car provided with separate coaches or compartments as above provided shall ride in any coach or compartment not designated for his race, after having been forbidden to do so by the conductor in charge of the train or car, or shall remain in any waiting room not set apart for the race to which he belongs, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than twenty-five dollars.

Should any passenger refuse to occupy the coach or compartment or room to which he or she is assigned by the officer of such railway company, said officer shall have the power to refuse to carry such passenger on his train, and should any passenger or any other person not passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room,

said agent shall have the power and it is made his duty to eject such person from such room, and for such neither they nor the railroad company which they represent, shall be liable for damages, in any of the courts of this State.

Section 7. The provisions of this Act shall not be so construed as to prohibit officers having in custody any person or persons, or employees upon the trains or cars in the discharge of their duties, nor shall it be construed to apply to such freight trains as carrying passengers in cabooses, provided that nothing herein contained shall be construed to prevent railway companies in this State from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly.

Section 8. Every railway company carrying passengers in this State shall keep this law posted in a conspicuous place in each passenger depot and in each passenger coach provided in this law.

Section 9. That nothing in this Act shall be construed to prevent the running of extra or special trains or cars for the exclusive accommodation of either white or negro passengers, if the regular trains or cars are operated as required by this Act and upon regular schedule.

Section 10. Conductors of passenger trains, street cars, urban, suburban or interurban lines provided with separate coaches or compartments shall have the authority to refuse

any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this Act, and the conductor in charge of the train, street car, urban, suburban or interurban car, shall have authority and it shall be his duty to remove from the train, coach, street car, urban, suburban or interurban car, any passenger not entitled to ride therein under the provisions of this Act; upon his refusal to do so knowingly shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty nor more than five hundred dollars, and the company, manager, agent, conductor, receiver or other officer, shall not be held for damages of any lawful removal of a passenger as provided herein.

Section 11. All fines collected under the provisions of this law shall go to the available common school fund of the county in which the conviction is had. Prosecutions under the provisions of this law may be instituted in any court of competent jurisdiction, in any county through or into which said railroad, urban, suburban, interurban railway may be run or have an office.

Section 12. An emergency exists for the preservation of the public safety by reason whereof this Act shall take effect sixty days from and after its passage and approval.

Approved December 18, 1907.

APPENDIX B

THE SEPARATE COACH LAW OF MISSISSIPPI.

(Sustained by the Supreme Court of the United States in the case of *Louisville, etc., R. R. Co.* v. *Mississippi*, 133 U. S. 587.)

Section 1. BE IT ENACTED, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

Section 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car or the compartment of a car (when it is divided by a partition) used for the race to which said passenger belongs; and that should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and neither he nor the railroad company shall be liable for any damages in any event in this State.

Section 3. That all railroad companies that shall refuse or neglect within sixty days after the approval of this act to comply with the requirements of section one of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more

than five hundred dollars; and any conductor that shall neglect to, or refuse to carry out the provisions of this act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense.

Section 4. That all acts and parts of acts in conflict with this act be, and the same are hereby repealed, and this act to take effect and be in force from and after its passage.

McCABE *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 15. Argued October 26, 1914.—Decided November 30, 1914.

Under the Enabling Act the State of Oklahoma was admitted to the Union on an equal footing with the original States, and has the same authority to enact public legislation not in conflict with the Federal Constitution as other States may enact. *Coyle* v. *Oklahoma*, 221 U. S. 559.

It is not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the white and African races. *Plessy* v. *Ferguson*, 163 U. S. 537.

While a state statute, although fair on its face, may be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, no discriminations unauthorized by the statute appear to have been practiced in this case under state authority.

The Oklahoma statute, requiring separate, but equal, accommodations for the white and African races, must, in the absence of a different construction by the state court, be construed as applying exclusively to intrastate commerce; and, as so construed, it does not contravene the commerce clause of the Federal Constitution.

The essence of the constitutional right to equal protection of the law is that it is a personal one and does not depend upon the number of persons affected; and any individual who is denied by a common carrier, under authority of the State, a facility or convenience which is furnished to another under substantially the same circumstances may properly complain that his constitutional privilege has been invaded.

The Oklahoma Separate Coach Law does discriminate against persons of the African race in permitting carriers to provide sleeping cars, dining cars and chair cars to be used exclusively by persons of the white race; this provision none the less offends against the Fourteenth Amendment even if there is a limited demand for such accommodations by the African race as compared with the white race.

In order to justify the granting of an injunction complainants must

show a personal need of it, and absence of adequate remedy at law. The fact that someone else, although of the same class as complainant, may be injured does not justify granting the remedy.

In an action, brought in the Federal court by several persons of the African race before the Separate Coach Law of Oklahoma went into effect, to enjoin the enforcement thereof on the ground that it contravened the Fourteenth Amendment, *held* that the allegations in the bill were too vague and indefinite to warrant the relief sought by complainants; that none of the complainants had personally been refused accommodations equal to those afforded to others or had been notified that he would be so refused when the act went into effect; that it did not appear that in such event he would not have an adequate remedy at law, and that the action could not be maintained. 186 Fed. Rep. 966, affirmed.

THE facts, which involve the constitutionality of the Separate Coach Law of Oklahoma, are stated in the opinion.

Mr. William Harrison, with whom *Mr. Edwin O. Tyler* and *Mr. Ethelbert T. Barbour* were on the brief, for appellants:

The court erred in holding that the Oklahoma statute does not operate and deprive those of African descent of the equal protection of the laws within the meaning of the Constitution, which implies not merely equal accessibility to the court for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.

The police power cannot be interposed to support a statute having no possible tendency to protect the community or for the preservation of the public safety, but which arbitrarily deprives the owner of liberty or property. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Holden* v. *Hardy*, 169 U. S. 366, 398; *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; Freund, Police Power, 525.

State police legislation may be invalid because it trenches on the sphere of the National Government under the Federal Constitution. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

So also as to police legislation which purports to deal with subjects beyond territorial jurisdiction. *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455, 464; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Missouri &c. Ry. Co.* v. *Haber*, 169 U. S. 618; *Reid* v. *Colorado*, 187 U. S. 137; *New York &c. R. Co.* v. *New York*, 165 U. S. 628; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

A law not enacted in good faith for the promotion of the public good but passed from the sinister motive of annoying or oppressing a particular person or class is invalid. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The Oklahoma Act is violative of the commerce clause of the Constitution. *Henderson* v. *New York*, 92 U. S. 259; *Welton* v. *Missouri*, 91 U. S. 275; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557.

The act does restrict and affect interstate, to the same extent as intrastate, commerce; and in this respect the act is so plain and unambiguous as to leave no room for interpretation. *Houghton* v. *Payne*, 194 U. S. 88.

The doctrine of contemporaneous practical construction does not apply to statutes which are explicit and free from any ambiguity. *Swift* v. *United States*, 105 U. S. 695; *United States* v. *Graham*, 110 U. S. 219; *Merrit* v. *Cameron*, 137 U. S. 542, aff'g 102 Fed. Rep. 947; *Franklin Sugar Co.* v. *United States*, 153 Fed. Rep. 653.

The term negro as used in the act includes every person of African descent as defined by the Constitution.

Passengers coming into Oklahoma, and going out and going through Oklahoma, upon their failure to go to the coach or compartment designated for the race to which they belong have been ejected, arrested and confined in the common jails.

Commerce among the commonwealths is traffic, transportation and intercourse between two points situated in different States. *Wabash R. R. Co.* v. *Illinois*, 118 U. S. 557; *Louisville Ry. Co.* v. *Mississippi*, 133 U. S. 587, 592; *Ches. & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 395; *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. Rep. 1, 19. *Pacific Express Co.* v. *Siebert*, 142 U. S. 339, distinguished.

The statute is not separable as to interstate and intrastate commerce, and, therefore, the whole act is unconstitutional. *United States* v. *Reese*, 92 U. S. 214; *Trade Mark Cases*, 100 U. S. 82; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Pollock* v. *Farmers Trust Co.*, 158 U. S. 636. See also Cooley's Const. Lim., p. 209; *State* v. *Denny*, 21 N. E. Rep. 275; *State* v. *Perry County Commissioners*, 5 Ohio, 497; *Island* v. *Louisiana*, 103 U. S. 80; *Spraigue* v. *Thompson*, 118 U. S. 90, 94; *Chi., Mil. & St. P. Ry. Co.* v. *Westby*, 178 Fed. Rep. 619, 632.

The very fact that the act subjects every passenger to the provisions of the law and makes no distinction or exception as to interstate passengers, raises a conclusive legal presumption that the legislature intended to make no distinctions and exceptions, and the act is not subject to judicial construction. To so do would be unjustifiable judicial legislation. The rule is that which is not denied is granted. *Hall* v. *DeCuir*, 95 U. S. 485; *Union Central Ins. Co.* v. *Champlin*, 116 Fed. Rep. 858, 860; *Wrightman* v. *Boone County*, 88 Fed. Rep. 435, 437; *Madden* v. *Lanchester Co.*, 65 Fed. Rep. 188, 194; *Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *Cella Commission Co.* v. *Bohlinger*, 147 Fed. Rep. 419, 425; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465, 488.

The statute is so formed and applied that its application and operation can be used to discriminate against one class of citizens. *Yick Wo* v. *Hopkins*, 118 U. S. 356;

Chy Lung v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370, 374; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The sleeping and parlor car proviso is an evasion as against prior existing rights and is a law without a remedy. The carriers operate under this law unevenly and oppressively to those of African descent.

The constitutional rights of citizens are not dependent upon considerations nor upon the varying conditions and circumstances. Citizens of African descent have no adequate remedy at law as the act provides no penalty for the failure or the refusal to provide equal accommodations, or chair cars, dining cars and sleeping cars, and said law is unconstitutional and void.

The act violates §§ 22 and 25 of the Enabling Act under which Oklahoma was admitted into the Union.

Race distinction in the law is any requirement by statute, constitutional, provisional or judicial legislation, that a person act differently if he is a member of one or another of the races in the United States. Congress intended that the only exception to the equality provision of the Enabling Act is that the State may establish and maintain separate schools for the white and colored children.

The State, after having accepted irrevocably the terms and all of the terms of the Enabling Act, cannot thereafter be heard to complain or to repudiate any or all of such terms. *Frantz* v. *Autry*, 91 Pac. Rep. 193.

The act conflicts with the Fourteenth Amendment. It is discriminatory. It was not passed for the health, safety and comfort of its citizens, but as a subterfuge under the guise of police power and police protection. The danger does not justify the degree of restraint imposed, but the act is wholly racial and based upon race and color as such.

An act that permits and even authorizes and directs the excluding of one class of persons, and in this case the

negroes, from privileges and immunities enjoyed by everybody else similarly situated, and excluding the negro, and leaving him without remedy, from the comforts and conveniences of chair cars, dining cars, sleeping cars, such as are enjoyed by all other men; which deprives the negro of the privileges and comforts which he enjoyed prior to the passage of such act; which now imposes a fine upon the negro if he attempts to exercise the rights which he enjoyed before the passage of such act, must defeat the purpose, defy the spirit, and violate the express provision of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Strauder* v. *West Virginia*, 100 U. S. 303, 306.

Mr. S. T. Bledsoe, *Mr. Charles West*, Attorney General of the State of Oklahoma, *Mr. J. R. Cottingham*, *Mr. C. O. Blake*, *Mr. Clifford L. Jackson*, *Mr. R. A. Kleinschmidt* and *Mr. C. E. Warner*, for appellees, submitted:

This court has not jurisdiction to entertain the appeal.

The Oklahoma Separate Coach Law is not violative of the commerce clause of the Constitution of the United States.

There is no charge that the railway companies are applying the state statute to interstate passengers.

The constitutionality of the Separate Coach Act is not affected by the Enabling Act, nor does that law conflict with the Fourteenth Amendment.

The statute is not divisible. *Abbott* v. *Hicks*, 44 La. Ann. 74; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Atch., Top. & Santa Fe Ry. Co.* v. *State*, 124 Pac. Rep. 56; *Bonin* v. *Gulf Co.*, 198 U. S. 115; *Bolln* v. *Nebraska*, 176 U. S. 83; *Butler Brothers* v. *U. S. Rubber Co.*, 156 Fed. Rep. 18; *Ches. & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388; *Chiles* v. *Ches. & Ohio Ry. Co.*, 218 U. S. 71; *Oklahoma* v. *Atch., Top. & S. F. Ry. Co.*, 25 I. C. C. Rep. 120; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688; *Florida Central Co.* v. *Bell*, 176 U. S. 321; *Hanford* v. *Davies*, 163 U. S. 274; *Louisville*

&c. R. R. Co. v. *State*, 6 So. Rep. 203; *Louisville &c. R. R. Co.* v. *Mississippi*, 133 U. S. 587; *McCabe* v. *Railway Co.*, 186 Fed. Rep. 966; *Ohio Valley Ry.* v. *Lander*, 47 S. W. Rep. 344; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339; *Permoli* v. *First Municipality*, 3 How. 589, 609; *Plessy* v. *Ferguson*, 163 U. S. 537; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505; *Shulthis* v. *McDougal*, 225 U. S. 561; *So. Ry. Co.* v. *King*, 217 U. S. 524; *Thompkins* v. *M., K. & T. Ry. Co.*, 211 Fed. Rep. 391; *Ward* v. *Race Horse*, 163 U. S. 504; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1.

The purpose of the case is to prevent separation of races, but the prayer only objects to distinction.

The proceeding cannot be one for mandatory injunction for equal facilities, nor is the action one for damages.

The state statute requires equal comforts. Neither the common law nor the Interstate Commerce Act gives a right of action enforceable in a Federal court before any application to the Interstate Commerce Commission as to interstate traffic.

The right of action cannot arise out of state law for want of jurisdiction in the lower court, nor can any right of action arise out of the Enabling Act or of the Constitution of the United States.

The plaintiffs do not allege lack of comforts under such circumstances as are sufficient to compel their furnishing, nor is any injury shown. *Atlantic Coast Line* v. *Mazurky*, 216 U. S. 122; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Coyle* v. *Smith*, 221 U. S. 559; *Covington* v. *Hagar*, 203 U. S. 109; *C., M. & St. P.* v. *Solon*, 169 U. S. 133; *Giles* v. *Harris*, 189 U. S. 475; *Int. Com. Com.* v. *Balt. & Ohio*, 145 U. S. 263; *Int. Com. Com.* v. *Ala. Co.*, 168 U. S. 165; *Int. Com. Com.* v. *Louisville Co.*, 73 Fed. Rep. 409; *M. & O. G.* v. *State*, 29 Oklahoma, 640, 653; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *St. L. & St. Co.* v. *Sutton*, 29 Oklahoma, 553; *Taft* v. *So. Ry. Co.*, 123 Fed. Rep. 792; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*,

204 U. S. 426; *United States* v. *L. S. & M. S. Ry.*, 197 U. S. 540; *United States* v. *Norfolk Ry. Co.*, 109 Fed. Rep. 831; *United States* v. *B. & O. R. R. Co.*, 145 U. S. 263; *United States* v. *Hanley*, 71 Fed. Rep. 673; *United States* v. *Sayward*, 160 U. S. 493; Compiled Laws of Oklahoma, 1910; 25 Stat. 862; 24 Stat. 24, 377.

MR. JUSTICE HUGHES delivered the opinion of the court.

The legislature of the State of Oklahoma passed an act, approved December 18, 1907 (Rev. Laws, Okla., 1910, §§ 860 *et seq.*), known as the 'Separate Coach Law.' It provided that 'every railway company . . . doing business in this State, as a common carrier of passengers for hire' should 'provide separate coaches or compartments, for the accommodation of the white and negro races, which separate coaches or cars' should 'be equal in all points of comfort and convenience' (§ 1); that at passenger depots, there should be maintained 'separate waiting rooms,' likewise with equal facilities (§ 2); that the term negro, as used in the act, should include every person of African descent, as defined by the state constitution (§ 3); and that each compartment of a railway coach 'divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach' within the meaning of the statute (§ 4).

It was further provided that nothing contained in the act should be construed to prevent railway companies 'from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly' (§ 7).

Other sections prescribed penalties both for carriers, and for passengers, failing to observe the law (§§ 5, 6). The act was to take effect sixty days after its approval (§ 12).

On February 15, 1908, just before the time when the statute, by its terms, was to become effective, five negro

citizens of the State of Oklahoma (four of whom are appellants here) brought this suit in equity against The Atchison, Topeka & Santa Fe Railway Company, The St. Louis & San Francisco Railroad Company, The Missouri, Kansas & Texas Railway Company, The Chicago, Rock Island & Pacific Railway Company and The Fort Smith & Western Railroad Company, to restrain these companies from making any distinction in service on account of race. On February 26, 1908,—after the act had been in operation for a few days—an amended bill was filed seeking specifically to enjoin compliance with the provisions of the statute for the reasons that it was repugnant (a) to the commerce clause of the Federal Constitution, (b) to the Enabling Act under which the State of Oklahoma was admitted to the Union (act of June 16, 1906, c. 3335, § 3, 34 Stat. 267, 269), and (c) to the Fourteenth Amendment. The railroad companies severally demurred to the amended bill, asserting that it failed to state a case entitling the complainants to relief in equity. The Circuit Court sustained the demurrers and, as the complainants elected to stand upon their bill, final decree dismissing the bill was entered. This decree was affirmed by the Court Circuit of Appeals (186 Fed. Rep. 966), and the present appeal has been brought.

The conclusions of the court below as stated in its opinion were, in substance:

1. That under the Enabling Act, the State of Oklahoma was admitted to the Union 'on an equal footing with the original States' and with respect to the matter in question had authority to enact such laws, not in conflict with the Federal Constitution, as other States could enact; citing, *Permoli* v. *First Municipality*, 3 How. 589, 609; *Escanaba Company* v. *Chicago*, 107 U. S. 678, 688; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Ward* v. *Race-Horse*, 163 U. S. 504; *Bolln* v. *Nebraska*, 176 U. S. 83. See also *Coyle* v. *Oklahoma*, 221 U. S. 559, 573.

2. That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the two races. *Plessy* v. *Ferguson*, 163 U. S. 537.

3. That the provision of § 7, above quoted, relating to sleeping cars, dining cars and chair cars did not offend against the Fourteenth Amendment as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other.

4. That in determining the validity of the statute the doctrine that an act although 'fair on its face' might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 373) was not applicable, as there was no basis in the present case for holding that any discriminations by carriers which were unauthorized by the statute were practised under state authority.

5. That the act, in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate and hence did not contravene the commerce clause of the Federal Constitution. *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 590; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 391; *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71.

6. That with respect to the existence of discriminations the allegations of the bill were too vague and uncertain to entitle the complainants to a decree.

In view of the decisions of this court above cited, there is no reason to doubt the correctness of the first, second, fourth and fifth of these conclusions.

With the third, relating to § 7 of the statute, we are

unable to agree. It is not questioned that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the Attorney General of the State, in the brief filed by him in support of the law, urges that "the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility." And in the brief of counsel for the appellees, it is stated that the members of the legislature "were undoubtedly familiar with the character and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel" in that State.

This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to

the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect and this amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be 'a multiplicity of suits,' there being at least 'fifty thousand persons of the negro race in the State of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. *Williams* v. *Hagood*, 98 U. S. 72, 74, 75; *Virginia Coupon Cases*, 114 U. S. 325, 328, 329; *Tyler* v. *Judges*, 179 U. S. 405, 406; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Davis & Farnum* v. *Los Angeles*, 189 U. S. 207, 220; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 197; *Collins* v. *Texas*, 223 U. S. 288, 295, 296.

The allegations of the amended bill, so far as they pur-

port to show discriminations in the conduct of these carriers, are these:

"That notwithstanding the terms of said Act of Congress and of the Constitution of the State of Oklahoma, the said above named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the State of Oklahoma, in this, to wit: that equal comforts, conveniences and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars and dining car accommodations by providing for your orators and other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act."

We agree with the court below that these allegations are altogether too vague and indefinite to warrant the relief sought by these complainants. It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; or that any one of the complainants has ever requested that accommodations be furnished to him in any sleeping cars, dining cars or chair cars; or that any of these five companies has ever notified any one of

these complainants that such accommodations would not be furnished to him, when furnished to others, upon reasonable request and payment of the customary charge. Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.

Decree affirmed.

MR. CHIEF JUSTICE WHITE, MR. JUSTICE HOLMES, MR. JUSTICE LAMAR and MR. JUSTICE MCREYNOLDS concur in the result.